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IN THE

Supreme Court of the United States

October Term, 1976.

No. 76-1219

ANDREW G. GRUTKA, as Bishop of the Catholic Diocese of Gary, Indiana,

Petitioner,

v.

ALEX V. BARBOUR, Regional Director of the Thirteenth Region, National Labor Relations Board,

and

LAY TEACHERS FEDERATION OF THE GARY DIOCESE, LOCAL 3493,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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INDEX.

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	3
Statement of the Case	4
Reasons for Granting the Writ	8
Conclusion	12
Appendix A	A1
Appendix B	A8
Appendix C	A16
Appendix D	A20

TABLE OF AUTHORITIES.

Cases:	Page
Aircraft & Diesel Equipment v. Hirsch, 331 U. S. 752 (1947)	10
Caulfield v. Hirsch, – F. Supp. – (C. A. No. 76-279, E. D. Pa., Feb. 17, 1977)	11
Leedom v. Kyne, 358 U. S. 188 (1958)	5, 8, 9
Lemon v. Kurtzman, 402 U. S. 602 (1971)	11
McCulloch v. Sociedad Nacional, 372 U. S. 10 (1963)	5, 9
Public Funds for Public Schools v. Marburger, 358 F. Supp. 29 (D. N. J. 1973), aff'd. 417 U. S. 961 (1974)	9
Public Utilities Commission of California v. United States, 355 U. S. 534 (1958)	10
Roman Catholic Archdiocese of Baltimore, et al. and Baltimore Lay Teachers' Organization, 88 LRRM 1169 (1975)	11
United States v. New Wrinkle, 342 U. S. 371 (1952)	10
Wisconsin v. Yoder, 406 U. S. 205 (1972)	9
Weinberger v. Salfi, – U. S. –, 95 S. Ct. 2457 (1975)	10
United States Constitution:	
Amendment 1	*passim*
Amendment 5	*passim*
Statutes:	
Judicial Code, 28 U. S. C. §§ 1254(1), 1331	2, 7
National Labor Relations Act, 29 U. S. C. § 141 *et seq.*	3

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—

The Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above case on February 2, 1977.

OPINIONS BELOW.

The opinion of the United States District Court for the Northern District of Indiana is not yet officially reported. A copy of this opinion is appended hereto as Appendix A. The opinion of the Court of Appeals is not yet officially reported. A copy of this opinion is appended hereto as Appendix B.

JURISDICTION.

The date of the order and judgment of the Court of Appeals for the Seventh Circuit is February 2, 1977.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

In this action the Bishop of the Roman Catholic Diocese of Gary, Indiana, on grounds of actual and threatened violation of, *inter alia,* the Religion Clauses of the First Amendment, sought injunctive relief to enjoin the application of the National Labor Relations Act to the schools under his religious authority, which schools this Court has held to be an "integral part of the religious mission of the Catholic Church." The preliminary injunction granted by the District Court was vacated by the Court of Appeals on the ground of want of District Court jurisdiction in that (a) "developing a factual record in labor disputes is a task peculiarly within the competence of the Board", and (b) "the statutory review procedures are fully adequate to protect the plaintiff's constitutional rights." The questions presented therefore are:

1. Has a District Court of the United States jurisdiction to preliminarily enjoin application of the National Labor Relations Act to schools which are an integral part

of the religious mission of a church where that court finds (a) that the plaintiff seeking the injunction has raised substantial claims under the Religion Clauses of the First Amendment and (b) that to inject the NLRB into the internal structure of those religious schools and to force the plaintiff to await exhaustion of agency proceedings under the Act constitutes irreparable harm to him?

2. Does the requirement of exhaustion of administrative remedies deny due process of law to religious litigants who raise substantial claims under the Religion Clauses of the First Amendment and are faced with immediate and irreparable harm, where the administrative agency has no specialized competence in the fields of religion or of constitutional law, where prior decisions of that agency show that continuation of the administrative process would be futile, and where continuation of that process will not dispose of the constitutional challenges raised?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The constitutional provisions involved are the Religion Clauses of the First Amendment:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ."

The statute giving the District Court power to issue the injunction is 28 U. S. C. § 1331. The statute, the application of which has been challenged by the Petitioner, is 29 U. S. C. § 141, *et seq.* (the National Labor Relations Act). Appendix D.

STATEMENT OF THE CASE.

Bishop Andrew G. Grutka, the Petitioner,[1] is governing head of the Roman Catholic Diocese of Gary, Indiana, and is charged by the law of his Church with ultimate responsibility, both spiritual and temporal, for the Catholic schools of the diocese. On September 16, 1976, the Bishop filed a complaint against the National Labor Relations Board,[2] seeking a preliminary and permanent injunction against application of the National Labor Relations Act to those schools and thus to restrain NLRB from further asserting jurisdiction over, or taking any action with respect to, Catholic schools, or teachers therein, of the Diocese of Gary and from holding an election which NLRB had ordered for October 7, 1976, for the lay teachers in those Catholic schools. The complaint also sought to enjoin NLRB's proceeding further under the Act in prosecuting an unfair labor practice charge against the Bishop. Finally, the complaint sought a declaratory judgment that the National Labor Relations Act is unconstitutional as applied to the said Catholic schools which are an integral part of the religious mission of the Catholic Church.

On September 24, 1976, the Bishop filed a Motion for Temporary Restraining Order to enjoin application of the Act to the schools on the ground of immediate and irreparable injury caused to him thereby through violation of his rights under the Religion Clauses of the First Amendment and under the Fifth and Ninth Amendments to the Constitution of the United States. To this Motion was appended the affidavit of F. Raymond Fowerbaugh, which affidavit included verification of the allegations of the complaint as well as specification of facts believed to constitute irreparable harm.

1. Hereinafter also referred to as "the Bishop".
2. Hereinafter referred to as "NLRB", or "the Labor Board".

On September 30, 1976, NLRB filed a Motion to Dismiss for lack of subject matter jurisdiction or alternatively for summary judgment. On October 5, 1976, the District Court, after hearing, issued a preliminary injunction enjoining all further action[3] by NLRB in exercising its jurisdiction. The District Court, basing its holding in part on *Leedom v. Kyne*, 358 U. S. 188 (1958), stated:

> "This Court views the plaintiff's arguments as somewhat consistent with that of the plaintiff in *Leedom*. In both cases the plaintiff alleged the NLRB exceeded its delegated powers. In *Leedom*, the NLRB violated a specific prohibition of the Act. In the instant cause, the plaintiff alleges the regulatory excess violates not a statutory prohibition but the Constitution itself." (App. A, A4).

The Court held the Bishop's challenge not frivolous but as involving "fundamental Constitutional issues" of great magnitude (App. A, A5) and of far-reaching importance (App. A, A3).

The District Court also based its holding on *McCulloch v. Sociedad Nacional*, 372 U. S. 10 (1963), stating:

> "If the *Leedom* exception [to a general rule requiring exhaustion of administrative remedies] can be read to include questions of national interest, surely alleged governmental intrusion into the ultra-sensitive First Amendment area of religion qualifies to allow district court jurisdiction based on *Leedom*." (App. A, A5).

Thereafter NLRB and the Respondent Union appealed to the United States Court of Appeals for the Seventh Cir-

3. The District Court permitted the scheduled election to take place, the ballots, however, to be impounded uncounted.

cuit. Oral argument took place on January 21, 1977, and on February 2, 1977, the Court of Appeals vacated the preliminary injunction on the ground that the District Court lacked subject matter jurisdiction. The principal reasons stated by the Court of Appeals for its decision were (a) that "developing a factual record in labor disputes is a task peculiarly within the competence of the Board" (App. B, A13), and (b) that "the statutory review procedures are fully adequate to protect the plaintiff's constitutional rights." (App. B, A14).

The Court sought to distinguish *Leedom v. Kyne* with the following statement:

> "Unlike *Kyne*, this case presents no patent disregard by the Board of its statutory jurisdiction." (App. B, A11).

It held that the nature and scope of state entanglement with religion could only be assessed through a factual record, and that developing a factual record "in labor disputes is a task peculiarly within the competence of the Board." (App. B, A12, A13).

The Court of Appeals' opinion contains no discussion of the facts which were in the record before it—the aforementioned affidavit of F. Raymond Fowerbaugh or the facts contained in the verified complaint, a motion to dismiss which had been made.

On February 11, 1977, pursuant to the mandate of the Court of Appeals, the ballots which had been cast in the October 7, 1976, election were counted, the majority of the teachers rejecting the Union as their bargaining representative. Objections to the Election were filed by the Union with NLRB February 15, 1977, thus extending the representation proceedings. Proceedings in the unfair labor practice charge case have been scheduled to resume

March 7, 1977. In the face of the resumption of the exercise of NLRB jurisdiction over his schools, the Petitioner, on February 22, 1977, applied to Mr. Justice Stevens for a stay in enforcement of the judgment and mandate of the Court of Appeals pending the filing of a Petition for Certiorari and disposition of that Petition by this Court.

The basis for jurisdiction in the federal District Court is 28 U. S. C. § 1331.

REASONS FOR GRANTING THE WRIT.

The questions presented are of first impression nationally. They pertain to the rights of churches to have prompt access to courts of law at the *beginning of—and not long after*—the assertion of governmental power over their religious mission. The questions bring to light a serious and nationally significant misapplication by a United States Court of Appeals of decisions of the Supreme Court with respect to the power and jurisdiction of the District Courts of the United States, especially in First Amendment cases.

1. The Court of Appeals decision while citing *Leedom v. Kyne, supra,* in fact largely nullifies it. In *Kyne,* the Supreme Court held that a District Court may intervene in NLRB proceedings where the Board has acted in excess of its statutory authority. By obvious implication the Court also held that the District Court had power to make its own determination of whether NLRB's action was in excess of its authority. The Court of Appeals broadly acknowledged that a District Court could enjoin exercises of Board jurisdiction which are in excess of its statutory authority or are unconstitutional (App. B, A12). But it held that a District Court *is without power to make its own determination as to whether such unlawful exercise exists.* That, said the Court of Appeals, is (a) because this is a "labor case" (and "labor cases" call for fact determinations by the Labor Board) and (b) because excessive entanglements between church and state are alleged (and these call for fact-finding which the Labor Board, and not a District Court of the United States, is solely competent to make).

The conclusion thus reached by the Court of Appeals largely blights the decision of the Supreme Court in *Kyne,*[4] since, for example, in a wide variety of cases involving executive invasion of personal liberty, District Courts feeling bound to follow the Court of Appeals decision would decline jurisdiction in favor of administrative bodies without competence (and usually without the independence) to weigh issues of a delicacy and complexity which have at times proved formidable even to this Honorable Court.

2. The denial here of early access to judicial review is a singularly important issue demanding Supreme Court review. If this Court upheld District Court jurisdiction in *Kyne,* where only action in excess of statutory authority was involved, it ought surely to uphold such jurisdiction where action alleged to be in excess of what is permissible under the Religion Clauses is involved. If this Court upheld District Court jurisdiction in *Sociedad Nacional,* where "public questions particularly high in the scale of our national interests" were involved, it ought surely to uphold such jurisdiction where the Free Exercise of religion is involved. Protection of rights of religious liberty has been deemed so essential a concern as to even override public interests which are at "the very apex of a function of a State." *Wisconsin v. Yoder,* 406 U. S. 205, 213 (1972). Indeed, this Court has upheld District Court jurisdiction to enjoin agency proceedings on the basis of constitutional claims in numerous other cases outside the

4. The Court of Appeals dealt likewise with the Supreme Court's decision in *McCulloch v. Sociedad Nacional,* 372 U. S. 10 (1963), by refusing to recognize a claim under the Religion Clauses of the First Amendment as "a uniquely compelling justification for prompt judicial resolution of the controversy over the Board's power." (App. B, A12). *Cf., Public Funds for Public Schools v. Marburger,* 358 F. Supp. 29, 43 (D. N. J. 1973), *aff'd.* 417 U. S. 961 (1974).

context of NLRA-mandated representation proceedings. See, *Public Utilities Commission of California v. United States,* 355 U. S. 534 (1958), *Aircraft & Diesel Equipment v. Hirsch,* 331 U. S. 752 (1947), *Weinberger v. Salfi,* — U. S. —, 95 S. Ct. 2457 (1975). The decision of the Court of Appeals is at variance with the principles clearly announced in all of these cases.

3. The grossness of the possible results are highlighted in the present case. Here the complaint alleged facts in support of claims under the Religion Clauses of the First Amendment which the District Court held to be substantial claims. The Court of Appeals, presumably, in view of the fact that NLRB was a party defendant, labeled and defined the case as a "labor case" and, having done that, granted the motion to dismiss, totally ignoring the universally established rule in the federal courts that a motion to dismiss a complaint must be deemed to admit the allegations of the complaint as true. *U. S. v. New Wrinkle,* 342 U. S. 371, 373 (1952). The Court of Appeals decision, therefore, must also be taken to stand for the broad proposition that, where District Court relief is sought against an administrative agency which moves to dismiss the complaint, that court may not so respect the allegations of the complaint.

4. It is respectfully urged, also, that this Court be concerned over the Court of Appeals' decision as a rule requiring bona fide religious litigants to undergo administrative proceedings (whose pace and duration—and thus burdens and cost—government is free to set) where such litigants raise (as here) non-frivolous, substantial claims which directly attack the application of an Act under the First Amendment and not mere maladministration. This is particularly of moment where, as here, the

administrative agency is without even a vestige of specialized competence in the field of constitutional law and has less than that in the field of religion.

5. Related is the futility of the attempting, by religious schools, to raise issues of religious liberty before the National Labor Relations Board which at least five times before has declared its jurisdiction over religious schools on the basis of its self-made definition thereof as not "completely religious",[5] in direct contradiction to this Court's opinions. See *e.g., Lemon v. Kurtzman,* 402 U. S. 602, 618 (1971).

Most of all, the decision of the Court of Appeals lays down the pernicious doctrine that irreparable harm to a church is not to be presumed from the very fact of the first assertion by government over that which lies at the very heart of its religious mission; that therefore the church must be denied access to the courts until government has completed its processes of interrogating it, investigating it, telling its employees of alleged statutory rights against it, and using against it government's full weaponry of summonses, subpoenas and hearings.

As the District Court stated in *Caulfield v. Hirsch,* — F. Supp. — (E. D. Pa., Feb. 17, 1977, No. C. A. 76-276): "This is not a labor case but a First Amendment case."[6] It therefore initially belongs in a District Court of the United States.

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5. See, *e.g., Roman Catholic Archdiocese of Baltimore et al. and Baltimore Lay Teachers' Organization,* 88 LRRM 1169 (1975).

6. The District Court in *Caulfield* did not issue an opinion. Appended as Appendix C, therefore, are the relevant pages of the transcript of the hearing on preliminary injunction therein on February 17, 1977, containing the comment of Hon. Donald W. VanArtsdalen, District Judge, on the instant (*Grutka*) case.

CONCLUSION.

For all of the foregoing reasons it is respectfully requested that this Petition be granted.

Respectfully submitted,

WILLIAM B. BALL,
WILLIAM J. O'CONNOR,
Attorneys for Petitioner.

APPENDIX A.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

No. H 76-249

ANDREW G. GRUTKA, as Bishop of the Catholic Diocese of Gary, Indiana,
Plaintiff

v.

ALEX V. BARBOUR, Regional Director for the Thirteenth Region, National Labor Relations Board,
Defendant

Memorandum Decision.

This cause came on to be heard on September 30, 1976, on the motion of the plaintiff, Andrew G. Grutka, Bishop of the Catholic Diocese of Gary, for a Temporary Restraining Order, enjoining the defendant, Regional Director of the National Labor Relations Board (hereafter NLRB), from further asserting jurisdiction with regard to the lay teachers employed by the Catholic schools located within the Diocese of Gary. Plaintiff further seeks to restrain the NLRB from further proceeding in Case No. 13-CA-15445 before the National Labor Relations Board relating to an unfair labor practice charge filed against the plaintiff, on the grounds that immediate and irreparable

injury is resulting and will result to the plaintiff from such actions. Also before the Court was a motion to dismiss or in the alternative for summary judgment filed by the defendant, NLRB. The motion to dismiss was considered at the hearing to the extent that it challenged the jurisdiction of this Court.

The plaintiff's argument is posited on the ground that the Wagner Act as amended by the Taft Hartley Act of 1947, 29 U. S. C. § 141 et seq. cannot constitutionally be protracted to apply to labor relations between the Catholic Diocese of Gary and lay teachers in their parochial schools, as to do so would violate rights guaranteed by the First Amendment of the United States Constitution. The plaintiff further alleges that the Labor Management Relations Act of 1947 was designed to deal with essentially industrial labor relations matters and conferred no jurisdiction upon the NLRB to interfere in intra-church matters intimately related to the formation and preservation of religious beliefs.

The defendant, NLRB, argues that this Court does not have subject-matter jurisdiction over issues of labor representation. Such issues the defendant argues are within the exclusive jurisdiction of the NLRB, until the exhaustion of administrative remedies, and then appealable to a United States Court of Appeals. Furthermore, the NLRB denies that its assertion of jurisdiction interferes with the First Amendment rights of the plaintiff or that the plaintiff is suffering or will suffer immediate and irreparable harm.

The same parties, in an essentially identical controversy, were before this court in *Grutka v. NLRB,* Hammond Civil No. H 75-251, at which time the Honorable Allan Sharp granted a temporary restraining order. That order was later dismissed by the Court on the basis that the

cause was inappropriate for hearing before a three judge panel as requested.

This Court heard extensive argument from counsel for both the plaintiff and the NLRB. Additionally, counsel representing the Lay Teachers Federation of the Gary Diocese, American Federation of Teachers, was permitted to argue as amicus curiae in order to allow all interested parties an opportunity to be heard.

Counsel for all parties made it abundantly clear that the matter before the Court involves Constitutional issues of far-reaching importance. The Court agrees with that assessment.

The Court is well aware that, barring extraordinary circumstances, district courts have no jurisdiction to adjudicate or intervene in labor representation controversies or charges of unfair labor practices. *Boire v. Greyhound Corporation,* 376 U. S. 473, 84 S. Ct. 894 (1964); *American Federation of Labor v. National Labor Relations Board,* 308 U. S. 401, 60 S. Ct. 300 (1940); *Vapor Blast Manufacturing Co. v. Madden,* 280 F. 2d 205 (7th Cir. 1960). However, under certain extraordinary circumstances district courts have exerted jurisdiction with later appellate approval. In *Leedom v. Kyne,* 358 U. S. 184, 79 S. Ct. 180 (1958), a union president sued the NLRB in a district court to set aside certification of a bargaining unit which included both professional and non-professional employees. When the district court entered judgment for the union, the NLRB appealed. The D. C. Circuit upheld the decision against the NLRB's argument that the district court had no jurisdiction. The United States Supreme Court affirmed, holding that the district court had jurisdiction where the absence of jurisdiction of the federal courts would mean a sacrifice or obliteration of a right which Congress gave professional employees, 358 U. S. at 190, 79 S. Ct. at 185.

The Supreme Court in *Leedom* distinguished between "review" of a NLRB decision in district court which the Act forbids and an action to strike down an order made in excess of its delegated powers. The Court in *Leedom* held that when the NLRB exceeded its delegated powers by acts specifically prohibited by the Act, a federal district court has jurisdiction of an original suit. *Leedom,* supra, at 358 U. S. 188, 189, 79 S. Ct. 184.

This Court views the plaintiff's argument as somewhat consistent with that of the plaintiff in *Leedom.* In both cases the plaintiff alleged the NLRB exceeded its delegated powers. In *Leedom,* the NLRB violated a specific prohibition of the Act. In the instant cause, the plaintiff alleges the regulatory excess violates not a statutory prohibition, but the Constitution itself.

The plaintiff's complaint states a constitutional challenge to a government agency's actions which is not clearly frivolous. This Court is constrained to view any regulatory excess which is allegedly violative of the First Amendment to sufficiently constitute "a sacrifice or obliteration" of a protected right so as to confer jurisdiction on a district court.

Another extraordinary circumstance was noted in *McCulloch v. Sociedad Nacional,* 372 U. S. 10, 83 S. Ct. 671 (1963). In that case, the NLRB sought to conduct a representation election between an American-owned Honduran employer and foreign employees. In *McCulloch,* the Supreme Court held that a district court could exercise jurisdiction based upon the exception fashioned in *Leedom v. Kyne,* supra. While the NLRB in *McCulloch* violated no specific prohibition as in *Leedom,* the Court found that the absence of this requirement could be overcome by the "presence of public questions particularly high in the scale of our national interest because of their international complexion . . ." If the *Leedom*

exception can be read to include questions of national interest, surely alleged government intrusion into the ultra-sensitive First Amendment area of religion qualifies to allow district court jurisdiction based on *Leedom.*

The case of *Fay v. Douds,* 172 F. 2d 720 (2nd Cir. 1949), also provides an exception to the general rule requiring exhaustion of intra-agency appeal procedures. In *Douds,* the Second Circuit held that constitutional challenges, not "transparently frivolous," could be litigated in district courts. The Court agrees with the NLRB that the *Douds* decision has been severely limited. Most decisions rejecting *Douds* such as *Vapor Blast v. Madden,* supra, are situations where the constitutional challenge is based on due process or a property right, where the jurisdiction of the NLRB was not attacked. In the instant cause, the constitutional challenge is based upon our most sacred amendment, and directly confronts the NLRB's authority to regulate.

The administrative doctrine requiring exhaustion of administrative remedies before resorting to the courts is a long-standing one. However, that doctrine alone is not sufficient to thwart a judicial remedy where a government agency exceeds its delegated authority. *Pan American Petroleum Corp. v. Pierson,* 284 F. 2d 649 (1960); *Varney v. Warhime,* 147 F. 2d 238 (1945).

The fundamental Constitutional issues involved in this proceeding are of such magnitude as to overshadow the particular parties themselves. No freedoms more fully demonstrate the commitments made by our founding fathers than those contained in the First Amendment, and none should be more zealously safeguarded.

The dual nature of a church-school in its religious-social mission requires constant faculty supervision and cooperation among teachers. Our Constitution guarantees the right to propagate religious beliefs through such

institutions. This Court cannot but consider the alleged harmful effect which awaiting the exhaustion of internal NLRB appellate proceedings may have on the plaintiff's right to provide religious instruction. The injection of the NLRB into the internal structure of the parochial schools of the Diocese of Gary necessarily accentuates any dissention among the teachers, both lay and religious.

This Court is of the opinion that the allegations contained in the plaintiff's complaint provide a sufficient jurisdictional basis for judicial action at the district court level. The constitutional challenge posited by the plaintiff is of particular note in that it concerns the First Amendment, and that it asserts that the Labor Management Relations Act of 1947 does not convey jurisdiction over church-schools.

As the remedy sought is equitable in nature, the Court must balance the equities and consider the effects its ruling may have on the parties. Since the Court's decision rests on jurisdictional and constitutional grounds supported by the record, the Court feels no necessity existed to hear evidence.

It has been brought to the attention of the Court that there is presently pending before the United States Court of Appeals for the Seventh Circuit a case which embraces essentially the same constitutional issues as does the cause before this Court. (*Catholic Bishop of Chicago v. NLRB*, No. 76-1600). The Court is of the opinion that the NLRB may have exceeded Constitutional limits in exercising jurisdiction over lay teachers in parochial schools, but before entering a final decision on the question, the Court feels constrained to await further guidance from the Seventh Circuit.

While the plaintiff contends in his complaint and motion for a temporary restraining order that immediate and irreparable harm will result from any further actions by

the NLRB, both the NLRB and the counsel for the Lay Teachers Federation effectively argued that a blanket injunction would do irreparable harm to their cause. It was persuasively brought to the attention of the Court that a representative election in the parochial schools of the Diocese of Gary has been scheduled for October 7, 1976; that such election has been scheduled for some time with considerable expense for advertising, and that any delay in the election would cause irreparable harm to the teachers seeking representation.

After considering the competing equities involved, it is the decision of the Court that upon the completion of the representation election set for October 7, 1976, the NLRB impound the uncounted ballots and thereafter be restrained from proceeding with the representation controversy, pending final Court action. The NLRB is further restrained from proceeding with Case No. 13-CA-15445 until such time as the Seventh Circuit renders a decision in *Catholic Bishop of Chicago v. NLRB*, No. 76-1600. In the event the awaited decision does not address the issues which are uppermost in this cause, this Court will hear further argument and render a decision as to whether the injunction should be made permanent.

At the conclusion of arguments heard on September 30, 1976, the amicus curiae representing the Lay Teachers Federation and counsel for the NLRB orally moved that the Court certify the issue of this Court's jurisdiction for immediate appeal pursuant to 28 U. S. C. § 1292(b). The Court grants the oral motion to certify as the issue involves a question of law as to which there is substantial ground for a difference of opinion.

Enter: October 5, 1976.

PHIL M. MCNAGNY, JR.,
Judge, United States District Court.

APPENDIX B.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 76-2129 and 76-2130

ANDREW G. GRUTKA, as Bishop of the Catholic Diocese of Gary, Indiana,
Plaintiff-Appellee,

v.

ALEX V. BARBOUR, Regional Director of the Thirteenth Region, National Labor Relations Board, et al.,
Defendants-Appellants.

On Appeal From the United States District Court for the Northern District of Indiana, Hammond Division.
H-76-249—Phil M. McNagny, Jr., *Judge.*

ARGUED JANUARY 21, 1977 — DECIDED FEBRUARY 2, 1977

Before CUMMINGS, PELL and SPRECHER, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* In October 1975, the Union [1] filed a representation petition with defendant Alex Barbour, the Regional Director of the 13th Region of the National Labor Relations Board, seeking an election in a

1. The Lay Teachers Federation of Gary Diocese, Local 3493, American Federation of Teachers.

unit composed of lay teachers [2] employed by the Roman Catholic Diocese of Gary, Indiana, in its grammar and high schools. After a hearing, Barbour determined that the Board had jurisdiction and scheduled a representation election for October 7, 1976. The election took place but the ballots have not yet been counted.

In May 1976, the president of the Union filed an unfair labor practice charge against the defendant Bishop of the Catholic Diocese of Gary, Indiana, alleging that the union official had been discharged because of his union activities, in violation of Sections 8(a)(1) and (3) of the National Labor Relations Act (29 U. S. C. §§ 158(a)(1) and (3)). Thereafter a complaint issued and a trial began before an administrative law judge on September 21, 1976. The General Counsel's case-in-chief has been closed.

On September 16, 1976, the Bishop filed a complaint in the district court seeking to enjoin the Board from holding the October 7, 1976, representation election, from continuing with the unfair labor practice proceeding, and from asserting jurisdiction over the Bishop. The court was asked to declare the National Labor Relations Act unconstitutional as applied to lay teachers in parochial schools. Eight days later the Bishop also sought a temporary restraining order seeking similar relief.

On October 5, 1976, the district court handed down a memorandum decision enjoining the counting of the ballots in the representation election or any other proceedings in the representation case and enjoining further proceedings in the unfair labor practice case pending this Court's determination of the constitutional issue in *Catholic Bishop of Chicago v. National Labor Relations Board,* No. 76-1600,

2. The unit sought by the Union included all of the full-time and part-time lay teachers, counselors, librarians and school nurses employed by the Diocese. For convenience, we refer to the members of the units as "lay teachers."

argued here on January 21, 1977, and now *sub judice*. Relying primarily on *Leedom v. Kyne*, 358 U. S. 184, the district court held that it had jurisdiction because the plaintiff had presented a "not clearly frivolous" First Amendment challenge to the Board's actions. On October 26, the Union was permitted to intervene as a defendant, but its motion to modify the preliminary injunction in order to tally the ballots cast was denied. Thereafter, the Board and Union appealed.[3]

It is well settled that district courts generally do not have jurisdiction to enjoin the Labor Board from conducting representation or unfair labor practice proceedings. Under Section 10 of the National Labor Relations Act (29 U. S. C. § 160), with exceptions which are immaterial here, the exclusive means of obtaining judicial review of Board rulings by an aggrieved party is in a court of appeals. Normally, the administrative remedies extant before the Labor Board must be exhausted as a prerequisite to federal jurisdiction. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 48-49; *Chicago Automobile Trade Association v. Madden*, 328 F. 2d 766, 768-769 (7th Cir. 1964), certiorari denied, 377 U. S. 979; *Vapor Blast Manufacturing Co. v. Madden*, 280 F. 2d 205, 208-209 (7th Cir. 1960), certiorari denied, 364 U. S. 910. *Catholic Bishop of Chicago, supra*, arrived at our judicial door through this usual procedural route.

However, an extraordinary procedural route, first charted by *Leedom v. Kyne*, 358 U. S. 184, exists occa-

3. Although the district court's opinion addressed issues raised in the plaintiff's motion for a temporary restraining order, it is clear from the indefinite temporal extent of the restraint imposed that the restraining order must be treated as a grant of a preliminary injunction for purposes of appellate jurisdiction under 28 U. S. C. § 1292(a)(1). *Sampson v. Murray*, 415 U. S. 61, 85-88. Indeed, in its subsequent order permitting union intervention, the court denied the Union's motion "to modify the *preliminary injunction*." (Emphasis supplied.)

sionally. In *Kyne*, the Board included both professional and nonprofessional employees in the bargaining unit that it found appropriate after refusing to take a vote among the professional employees of a labor organization to determine whether a majority of them would "vote for inclusion in such unit," as mandated by Section 9(b)(1) of the National Labor Relations Act (29 U. S. C. § 159 (b)(1)). As a result, it could properly be said of the suit in *Kyne* that it

> "is not one to 'review,' in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction. Rather it is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act." 358 U. S. at 188.

Therefore the fact-finding mission, the considerations of administrative expertise and the desire to prevent litigious interruptions of the on-going administrative process, which together make up the *raison d'etre* of the exhaustion doctrine (*Weinberger v. Salfi*, 422 U. S. 749, 765), are simply irrelevant when the Board has clearly breached the bounds of its proper authority as a matter of law. See *Machinery, Scrap Iron, etc. Employees, Local 714 v. Madden*, 343 F. 2d 497, 499 (7th Cir. 1965), certiorari denied, 382 U. S. 822; cf. *Federal Trade Commission v. Feldman*, 532 F. 2d 1092, 1096 (7th Cir. 1976); *Federal Trade Commission v. Miller*, – F. 2d – (7th Cir. Jan. 24, 1977). Unlike *Kyne*, this case presents no patent disregard by the Board of the bounds of its statutory jurisdiction.[4]

4. The memorandum decision also relied upon *McCulloch v. Sociedad National*, 372 U. S. 10, 16-17, where the district court enjoined a Board order requiring an election for seamen on ships flying a Honduran flag of convenience, which had caused international protests. The Supreme Court, in ratifying the district court's jurisdiction, explicitly stated that *Sociedad National* is "not

It may be assumed that *a fortiori* a district court could enjoin an exercise of Board jurisdiction which was unconstitutional as a matter of law. In the religious area, the essence of First Amendment inquiry is entanglement, *i.e.*, whether the involvement of the state has improperly established religion or impermissibly interfered with the free exercise of a religious belief. See *Roemer v. Board of Public Works*, – U. S. –, 44 LW 4939; *Tilton v. Richardson*, 403 U. S. 672; *Lemon v. Kurtzman*, 403 U. S. 602; *Wisconsin v. Yoder*, 406 U. S. 205. But the nature and scope of the state entanglement attacked can only be measured against a factual record delineating the character of entanglement which assertedly arises from the state intrusion. Where, as here, the very operation of the exhaustion doctrine serves to create a record upon which the constitutionality of application of the challenged statute may be judged, a premature review in the district court is singularly inappropriate. As the Supreme Court noted in *Boire v. Greyhound Corp.*, 376 U. S. 473, 481, when the central question in a labor case

> "is essentially a factual issue, unlike the question in *Kyne*, which depended solely upon construction of the statute ° ° ° [the Court will not] permit plenary district court review of Board orders in certification proceedings whenever it can be said that an erroneous assessment of the particular facts before the Board has led it to a conclusion which does not comport with law. Judicial review in such a situation has been limited by Congress to the courts of appeals ° ° °."

4. (Cont'd.)
to be taken as an enlargement of the exception in *Kyne*." 372 U. S. at 17. Indeed, the critical national interest involved in *Sociedad National* was so compelling that the "[i]mportant interests of the immediate parties" were subjugated entirely to a "uniquely compelling justification for prompt judicial resolution of the controversy over the Board's power." *Id.*

The Bishop raises two somewhat related arguments which assert that in the context of the First Amendment, the matter of law/matter of fact distinction outlined above is an overly facile solution to the problem of when district court jurisdiction is appropriate. The Bishop's first argument is that for any constitutional challenge to administrative action, the need for exhaustion is vitiated since the Board is inherently unsuited to judge the constitutionality of the National Labor Relations Act. It is true that "[a]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies." *Oestereich v. Selective Service Local Board No. 11*, 393 U. S. 233, 242 (Harlan, J., concurring); *Public Utilities Commission of California v. United States*, 355 U. S. 534, 539-540. However, in these cases, the factual predicate has not been in dispute, so that the only issue remaining was the constitutionality of the statute as a matter of law. *Mathews v. Diaz*, 44 LW 4748; *Wilson v. Edelman*, 542 F. 2d 1260, 1271-1273 (7th Cir. 1976). The matter of fact/matter of law distinction of *Boire*—the difference between a challenge to the application of a particular provision of a statute to a particular set of facts as contradistinct from a challenge to the particular provision on its face—which respectively operates to deny or permit district court jurisdiction—is a proper governing principle when the allegedly *ultra vires* action by the agency is attacked on constitutional grounds. *Johnson v. Robison*, 415 U. S. 361, 366-368; *Weinberger v. Salfi*, 422 U. S. 749, 761-762. Since the dimension of state-church entanglement can only be intelligently assessed against a developed factual background and since developing a factual record in labor disputes is a task peculiarly within the competence of the Board, we recognize the importance here of permitting the exhaustion doctrine to run its normal

course. Because the Bishop does not seek review of agency action bottomed on the plain wording of a statute which is alleged to be facially unconstitutional, the *Boire* teachings on the rare availability of district court review are freely transferrable to the constitutional realm.[5] *Weinberger v. Salfii*, 422 U. S. 749, 764-767. Cf. *Wilson v. Edelman*, 542 F. 2d 1260, 1273 (7th Cir. 1976).

The Bishop's second argument is based on the character of his constitutional attack. Apart from the theoretical resolution of a generalized constitutional attack on the Board's actions, the Bishop asserts that a challenge on First Amendment grounds presents special conceptual problems deriving from the "chilling effect" of First Amendment theory, citing *Wolff v. Selective Service Board No. 16*, 372 F. 2d 817, 823-825 (2d Cir. 1967).[6]

The constitutional allegations of this complaint do not confer jurisdiction upon the district court because the statutory review procedures are fully adequate to protect the plaintiff's constitutional rights.[7] The cases relied upon

5. In fact, the *Boire* distinction has been applied to review of Selective Service Board action involving religious-based exemptions and deferments. Pre-induction review in the courts in the face of a statute which prevented the same is allowed only to resolve claims that the statutes or regulations administered are invalid on their face. Compare *Oestereich v. Selective Service Local Board No. 11*, 393 U. S. 233, and *Breen v. Selective Service Local Board No. 16*, 396 U. S. 460, with *Clark v. Gabriel*, 393 U. S. 256 and *Fein v. Selective Service System Local Board No. 7*, 405 U. S. 365. See generally Hart & Wechsler, The Federal Courts and the Federal System 365-372 (2d ed. 1973).

6. *Wolff* involved a claim that the Board had misapplied the applicable statutes or regulations in revoking a draft deferment for participation in a demonstration, and not a challenge to the validity of the laws themselves. In this light, *Wolff* clearly did not survive the draft cases in the Supreme Court's 1968 October Term. See note 5 *supra*.

7. The district court opinion also relied on *Fay v. Douds*, 172 F. 2d 720 (2d Cir. 1949). If still viable, *Fay* is inapplicable because Bishop Grutka is not asserting a vested property right with respect to a collective bargaining agreement where he has no way

in the memorandum decision below and by the plaintiff before this Court are inapplicable because there simply is no unavoidable "chill." If the Union wins this election and is certified by the Board, the plaintiff may refuse to bargain with the Union and test the validity of the Board's jurisdiction in this Court. Similarly, if the union president should prevail in his unfair labor practice trial, the plaintiff can defend an enforcement suit in this forum. Thus the *status quo* in this case does not impede the free exercise of religious belief.

In holding that the district court has no jurisdiction, we are not passing on the merits of the controversy. For want of jurisdiction, the district court's order will be vacated to permit the Board to proceed to conclude both the representation and unfair labor practice cases. Any First Amendment challenge may later be presented in this Court.

The order of October 5, 1976,[8] is vacated and set aside with directions to dismiss the action. Our mandate shall issue forthwith.

7. (Cont'd.)
of ultimately obtaining judicial review. *Aircraft & Diesel Corp. v. Hirsch*, 331 U. S. 752, 773-774, relied on by the plaintiff, is likewise inapposite because "inadequacy of the prescribed procedure and impending harm" have not been sufficiently shown.

Since the plaintiff's constitutional rights have adequate protection in the Court of Appeals, Congress' decision to place exclusive jurisdiction in this Court is unchallengeable. *Lockerty v. Phillips*, 319 U. S. 182. See generally Hart & Wechsler, The Federal Courts and the Federal System 313-324 (2d ed. 1973).

8. Insofar as the district court's order of October 26, 1976, refused to modify its preliminary injunction to allow the tally and disclosure of the ballots cast on October 7, 1976, it is also vacated.

APPENDIX C.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Caulfield v. Hirsch, Civil Action No. 76-279

Transcript of Proceedings on Application for Preliminary Injunction Before Judge Donald W. VanArtsdalen February 17, 1977.

Despite the factual differences between the case presently before me and the Grutka case, which might be utilized to distinguish the two cases, I find such factual differences to be insubstantial as to any controlling legal issues regarding this Court's jurisdiction.

Grutka, as I read the case, squarely held that the District Court had no jurisdiction.

Rather than attempting to differentiate the cases on some factual grounds intellectual integrity leads me to conclude that if this District Court, either as a single judge or as a three-judge court, has any jurisdiction then the Grutka case was wrongly decided.

If I as a district judge am to rule differently than that of any Circuit Court of Appeals, albeit a circuit court other than the one in which I am now sitting, and thus not legally compelling or binding upon this Court, but certainly of very strong precedential value, it must be done with great caution and perhaps temerity. Nevertheless, it is my duty to interpret the law and the jurisdictional issues to the best of my understanding.

In the absence of any binding decision from the U. S. Supreme Court or the Third Circuit Court of Appeals, it is up to this Court to decide whether it has jurisdiction in the first instance.

Concluding as I do that this District Court does have jurisdiction of the subject matter, I am of course reminded of the old-age saying, "That fools rush in where angels fear to tread."

I am of the opinion that this case comes correctly within what I will term as the Leedom v. Kyne exception, reported at 358 U. S. 184. There the Supreme Court carved out a narrow exception in which a district court could vacate a determination of the National Relations Board that was made in excess of the powers of the National Labor Relations Board.

Later cases have very narrowly construed Leedom v. Kyne to those situations where the Board clearly exceeds its express statutory powers as set forth in the statute. And this is discussed in the Grutka case.

The difficulty as I see it with such a narrow interpretation is that in order for a District Court to determine whether it has jurisdiction it must first determine the merits of the case, that is it must determine not only that the order exceeds the Board's power but that it clearly does so. To determine the merits of a case in order to determine if a court has jurisdiction it seems to me to be following the old-fashioned expression of "putting the cart before the horse."

The issues in this case to be decided substantively are whether as a matter of statutory construction the Board has exceeded or is attempting to exceed its authority and, if not, whether under the Constitution such statutory authority, if it has been so granted, may be granted to it by Congress.

If in Leedom v. Kyne a District Court has jurisdiction to determine that the National Labor Relations Board exceeded its statutory authority it would seem to me likewise true that a District Court should also be able to determine

whether the National Labor Relations Board is exceeding its authority under the United States Constitution.

There are a few other reasons why I am of the opinion that Leedom v. Kyne exception should be applied in this case. The ordinary commercial or industrial enterprises that may normally be subject to the National Labor Relations Board, where they seek to challenge on statutory or constitutional grounds, of course, the normal procedure would be to refuse to comply with the National Labor Relations Board's order and after enforcement proceedings have the matter determined directly by the Circuit Court of Appeals.

We are here, however, dealing basically with the delicate relationships between the Government and a religious organization under the First Amendment, and an organization whose members comprise a very sizable proportion of our entire population; a religious organization that I think it can be said is devoted to obeying the law.

I deem it wholly inappropriate to rule in such a situation that the only way a challenge to the order of the National Labor Relations Board can be made is to in effect defy the order and force the National Labor Relations Board to seek enforcement proceedings.

Clearly, this case is not the usual type of situation where a single individual must exhaust administrative remedies. Especially in this case we know that however logical the exhaustion of administrative remedies doctrine may be in most instances, here clearly the National Labor Relations Board has made a decision, and there is no reasonable likelihood of any change in that decision. This is not a labor case but a First Amendment case.

I do not deem this as an action to review action of the National Labor Relations Board but rather one that seeks to restrain conduct which is contended to be in excess of its constitutional authority.

In addition, the case of McCulloch v. Sociedad, 372 United States 10, decided in 1962, indicated by its wording, to me at least, that in cases of great public and national interest involving important and compelling issues with respect to the National Labor Relations Board's power, and in certain unique situations, a district court would have jurisdiction. I concede that the facts of the McCulloch case are entirely different from this one, but insofar as involving matters of great public and national interest it does seem to me that this case would fall within the rationale of that exception.

Therefore, I will rule that the District Court has jurisdiction to determine whether the National Labor Relations Board has either the statutory or constitutional authority to order a representation election on behalf of the lay teachers of the elementary schools of the Catholic Schools of the Archdiocese of Philadelphia.

APPENDIX D.

29 U. S. C.

§ 141.

(a) This chapter may be cited as the "Labor Management Relations Act, 1947".

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

§ 151.

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which

have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow

of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

§ 157.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

§ 158.

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for

believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

. . . .

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2)-(4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who

engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158 to 160 of this title, but such loss of status for such employee shall terminate if and when he is re-employed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this subsection shall be modified as follows:

(A) The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of paragraph (4) of this subsection shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

§ 159.

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the

employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided,* That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees

in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board–

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section;

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question

of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 160(c) of this title.

(3) No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this subchapter in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling.

(d) Whenever an order of the Board made pursuant to section 160(c) of this title is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsection (e) or (f) of section 160 of this title, and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

(e) (1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 158(a)(3) of this title, of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

(2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

§ 160.

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided,* That the Board is empowered by agreement with any

agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other

person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further,* That in determining whether a complaint shall issue alleging a violation of subsection (a) (1) or (a) (2) of section 158 of this title, and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of

the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

(d) Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or part, any finding or order made or issued by it.

(e) The Board shall have the power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of

such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact is supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court

of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

(g) The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

(h) When granting appropriate temporary relief or a restraining order, or making and entering a decree en-

forcing, modifying, and enforcing as so modified, or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by sections 101 to 115 of this title.

(i) Petitions filed under this subchapter shall be heard expeditiously, and if possible within ten days after they have been docketed.

(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

(l) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of

paragraph (4)(A), (B), or (C) of section 158(b) of this title, or section 158(e) of this title or section 158(b)(7) of this title, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further,* That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: *Provided further,* That such officer or regional attorney shall not apply for any restraining order under section 158(b)(7) of this title if a charge against the employer under section 158(a)(2) of this title has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further,* That for the pur-

poses of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 158(b)(4)(D) of this title.

(m) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of subsection (a)(3) or (b)(2) of section 158 of this title, such charge shall be given priority over all other cases except cases of like character in the office where it is filed or to which it is referred and cases given priority under subsection (*l*) of this section.

§ 161.

For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by sections 159 and 160 of this title—

(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party, to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such

proceeding or investigation requested in such application. Within five days after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

(2) In case of contumacy or refusal to obey a subpena issued to any person, any district court of the United States or the United States courts of any Territory or possession, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

(4) Complaints, orders, and other process and papers of the Board, its member, agent, or agency, may be served either personally or by registered mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. The verified return by the individual so serving the same setting forth the manner of such service shall be proof of the same, and the return post office receipt or telegraph receipt therefor when registered and mailed or telegraphed as aforesaid shall be proof of service of the same. Witnesses summoned before the Board, its member, agent, or agency, shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

(5) All process of any court to which application may be made under this subchapter may be served in the judicial district wherein the defendant or other person required to be served resides or may be found.

(6) The several departments and agencies of the Government, when directed by the President, shall furnish the Board, upon its request, all records, papers, and information in their possession relating to any matter before the Board.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1219

ANDREW G. GRUTKA, AS BISHOP OF THE CATHOLIC DIOCESE OF GARY, INDIANA,

Petitioner.

vs.

ALEX V. BARBOUR, REGIONAL DIRECTOR OF THE THIRTEENTH REGION, NATIONAL LABOR RELATIONS BOARD,

and

LAY TEACHERS FEDERATION OF THE GARY DIOCESE, LOCAL 3493,

Respondents.

BRIEF ON BEHALF OF THE LAY TEACHERS FEDERATION OF THE GARY DIOCESE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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INDEX.

	PAGE
Question Presented	2
Statement of the Case	3
Argument for Denying the Writ	6
I. The Court of Appeals Properly Held the District Court Lacked Jurisdiction	6
II. The Rationale of Federal Legislation in This Area Is the NLRB Must Hear and Determine All Issues in the First Instance	9
III. The Employer's Contentions Are Without Merit	12
Conclusion	17

TABLE OF AUTHORITIES.

Aircraft & Diesel Equipment Corp. v. Hirsh, 331 U. S. 752, 67 S. Ct. 1493 (1947) 14

Associated Press v. N. L. R. B., 301 U. S. 103, 57 S. Ct. 650 (1937) 10, 16

Bishop v. N. L. R. B., 502 F. 2d 1024 (5th Cir. 1974) 6

Board of Tr. of Mem. Hosp. of Fremont City v. N. L. R. B., 523 F. 2d 845 (10th Cir. 1975) 6

Boire v. Greyhound Corporation, 376 U. S. 473, 84 S. Ct. 894 (1964) 6, 7, 8, 11

Bro. of Ry & S. C. v. Ass'n For Ben. of Non-Con. Emp., 380 U. S. 650, 85 S. Ct. 1192 (1965) 8

Cap Santa Vue, Inc., 172 NLRB 1558, enforced 424 F. 2d 883 (D. C. Cir. 1970) 10, 16

Cardinal Timothy Manning Roman Catholic Archbishop of the Archdiocese of Los Angeles v. N. L. R. B., Case No. 77-1286, Pending *sub Judice*, U. S. Court of Appeals, Ninth Circuit 16

[The] Catholic Bishop of Chicago v. N. L. R. B. (Illinois Education Association, Intervenor), Case No. 76-1600 Pending *sub Judice*, U. S. Court of Appeals, Seventh Circuit 16

Catholic Charities of Buffalo, 220 NLRB No. 5 (90 LRRM 1279) 10

Communications Workers of America v. United Telephone Company of Ohio, 478 F. 2d 310 (6th Cir. 1973).... 6

Cornell University, 183 NLRB 329 10

Diocese of Fort Wayne-South Bend, Ind. v. N. L. R. B., Case No. 76-1638 Pending *sub Judice*, U. S. Court of Appeals, Seventh Circuit 16

Good Foods Manufacturing & Processing Corp., 195 NLRB 418, enforced 492 F. 2d 1302 (7th Cir. 1974) 10, 16

Leedom v. Kyne, 358 U. S. 184, 79 S. Ct. 180 (1958) 7, 12, 13

Lemon v. Kurtzman, 403 U. S. 602, 91 S. Ct. 2105 (1971) 17

Local No. 1547, I. B. E. W. v. Local No. 959, I. B. T., C., W. & H., Ind., 507 F. 2d 872 (9th Cir. 1974).... 6

McCulloch v. Sociedad Nacional, 372 U. S. 10, 83 S. Ct. 671 (1963) 7, 12

Myers v. Bethlehem Shipbuilding Corporation, 303 U. S. 41, 58 S. Ct. 459 (1938) 6, 7, 9, 10, 15

National Alliance of Postal & Fed. Emp. v. Klassen, 514 F. 2d 189 (D. C. Cir. 1975) 6

N. L. R. B. v. E. C. Atkins & Co., 331 U. S. 398, 67 S. Ct. 1265 (1947) 1

N. L. R. B. v. Hearst Publications, 322 U. S. 111, 64 S. Ct. 851 (1944) 9, 11

N. L. R. B. v. Jones & Laughlin S. Corp., 301 U. S. 1, 57 S. Ct. 615 (1937) 9, 16

N. L. R. B. v. Reliance Fuel Oil Corporation, 371 U. S. 224, 83 S. Ct. 312 (1963) 9

Public Utilities Commission of California v. United States, 355 U. S. 534, 78 S. Ct. 446 (1958) 14

Roman Catholic Archdiocese of Baltimore, 216 NLRB 249 10

Schlesinger v. Councilman, 420 U. S. 738, 95 S. Ct. 1300 (1975) 11, 13, 15, 16, 17

Sears, Roebuck and Co. v. N. L. R. B., 473 F. 2d 91 (D. C. Cir. 1972) 15

Sears, Roebuck and Co. v. Solien, 450 F. 2d 353 (8th Cir. 1971) 7

Sterling Drug, Inc. v. Weinberger, 509 F. 2d 1236 (2nd Cir. 1975) 6, 8

Sunday School Board of Southern Baptist Convention, 92 NLRB 801 .....10, 16

Vapor Blast Manufacturing Company v. Madden, 280 F. 2d 205 (7th Cir. 1960), cert. denied 364 U. S. 910.. 7

Weinberger v. Salfi, ... U. S. ....., 95 S. Ct. 2457 (1975) 13, 14, 15

Wellman Industries, Inc. v. N. L. R. B., 490 F. 2d 427 (4th Cir. 1974) 6

Western Meat Packers, Inc., 148 NLRB 444, enforcement denied on other grounds 350 F. 2d 804 (10th Cir. 1965) 10, 16

Wisconsin v. Yoder, 406 U. S. 205, 92 S. Ct. 1526 (1972) 11, 17

Statute.

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C. § 151 *et seq.*) Section 9(b) (1) (29 U. S. C. 159(b)(1)) 7

Other.

29 C. F. R. Section 103.1 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1219.

ANDREW G. GRUTKA, AS BISHOP OF THE CATHOLIC DIOCESE OF GARY, INDIANA,

Petitioner,

vs.

ALEX V. BARBOUR, REGIONAL DIRECTOR OF THE THIRTEENTH REGION, NATIONAL LABOR RELATIONS BOARD.

and

LAY TEACHERS FEDERATION OF THE GARY DIOCESE, LOCAL 3493,

Respondents.

BRIEF ON BEHALF OF THE LAY TEACHERS FEDERATION OF THE GARY DIOCESE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The Lay Teachers Federation of the Gary Diocese, Local 3493, American Federation of Teachers (herein called "Union") respectfully submits this brief in opposition to the petition for a writ of certiorari filed by Andrew G. Grutka, as Bishop of the Catholic Diocese of Gary, Indiana (herein called "Employer").[1]

1. There being no dispute that the Bishop, ". . . is charged . . . with ultimate responsibility . . . for the Catholic schools of the diocese" (Pet. Brief, p. 4), there can be no question he is properly termed and is the employer in this matter. *N. L. R. B.* v. *E. C. Atkins & Co.*, 331 U. S. 398, 413-414, 67 S. Ct. 1265, 1273 (1947).

QUESTION PRESENTED.

The Employer's statement of the questions presented assumes conclusions of fact not warranted in the record. For example, whether the schools in question, "are an integral part of the religious mission" or whether said schools are "religious" at all (Pet. Brief, p. 3) are questions of fact to be determined on a full record made before the National Labor Relations Board (hereinafter referred to as the "NLRB" or the "Board"). Said record is not before this Court (see, *infra*, pp. 11, 16).

The Union proposes the following as the question presented:

> Whether a United States District Court has jurisdiction to enjoin proceedings by the National Labor Relations Board with respect to private schools operated by a religious entity.

STATEMENT OF THE CASE.

The Union first invoked the processes of the NLRB by filing a petition for certification on October 21, 1975 (Un. App. II, p. A7),[2] followed by a second amended petition (Un. App. I, pp. A1-A6).

The injunction proceeding here involved is the second such attempt by the Employer. Shortly after the Union filed its petition with the Board the Employer sought and obtained for three months an injunction from the Honorable Allen Sharp of the U. S. District Court for the Northern District of Indiana (Un. App. II, pp. A8, A12). After a consideration of the Board's motion to dismiss and for summary judgment Judge Sharp dismissed the Employer's action as an improper use of the three judge court procedure (Un. App. II, pp. A7-A12). No appeal was taken from Judge Sharp's decision. Shortly after Judge Sharp's dismissal of the Employer's first injunction attempt, the Employer discharged the Union's chief official, Robert Madsen, who then filed charges of discrimination with the Board (Un. App. III, p. A13).

The Board's hearing on the Union's election petition lasted eight days, reported in 1049 pages of transcript and seventy exhibits. During this hearing the Employer enjoyed the fullest opportunity to present his principal claim of infringement of religion. Upon that record and briefs filed by the parties, the Board through its Regional Director issued its Decision and Direction of Election on May 21, 1976 (Un. App. IV, pp. A15-A26). The Employer filed a request to review the

2. For ease of reference the Union's Appendices, attached to this brief, have been designated by roman numerals and referred to as "Un. App." followed by the appendix number and page. The Employer's appendices shall be referred to as "Pet. App." followed by the assigned letter of the alphabet and page.

Regional Director's decision with the Board and the Board denied the request on July 7, 1976. As is apparent on the face of the decision, the Board fully considered the Employer's jurisdictional constitutional claim (Un. App. IV, pp. A16-A18), as well all other appropriate election issues.

Although the Employer was aware as early as May 21, 1976, and surely by July 7, 1976 when the Board denied its request for review, that the Board intended to conduct an election, it did not seek injunctive relief until September, 1976, only a short time before the election scheduled for October 7, 1976 (Pet. Brief, p. 4).

While the Employer claims the District Court found this case to involve fundamental constitutional issues of great magnitude and of far reaching importance (Pet. Brief, p. 5) an examination of the entire decision indicates that the District Court was uncertain of the merits of the Employer's claim. The Honorable Phil M. McNagny, Jr., said:

> It has been brought to the attention of the Court that there is presently pending before the United States Court of Appeals for the Seventh Circuit a case which embraces essentially the same constitutional issues as does the cause before this Court. (*Catholic Bishop of Chicago* v. *N. L. R. B.*, No. 76-1600). The Court is of the opinion that the NLRB *may have exceeded Constitutional limits in exercising jurisdiction over lay teachers in parochial schools, but before entering a final decision on the question, the Court feels constrained to await further guidance from the Seventh Circuit.* (Pet. App. A, p. A6, emphasis supplied.)

As to the Employer's claim that the Court of Appeals did not discuss the facts before it (Pet. Brief, p. 6), the Court of Appeals as all others involved in this proceeding was aware that the District Court acted merely on the nature of the claim, and its own determination to await guidance from the higher Court, and thus, admittedly, the District Court took no evidence in the case. The District Court said:

> Since the Court's decision rests on jurisdictional and constitutional grounds supported by the record, *the Court feels no necessity existed to hear evidence*. (Pet. App. A., p. 6, emphasis supplied.)

In all other respects the Employer's Statement of the Case correctly sets forth the chronology of events in the Courts below except that on February 25, 1977 Mr. Justice Stevens denied the Employer's application for a stay in enforcement of the judgment and mandate of the Court of Appeals.

ARGUMENT FOR DENYING THE WRIT.

I.

THE COURT OF APPEALS PROPERLY HELD THE DISTRICT COURT LACKED JURISDICTION.

This matter does not present any new question or any deviation from well established precedent. This Court held in *Myers* v. *Bethlehem Shipbuilding Corporation*, 303 U. S. 41, 50, 58 S. Ct. 459, 463 (1938):

> Since the procedure before the Board is appropriate and the judicial review so provided is adequate, Congress had power to *vest exclusive jurisdiction in the Board and the Circuit Court of Appeals.* (Emphasis supplied.)

Absent extraordinary circumstances, U. S. District Courts lack jurisdiction with respect to the Board's unfair labor practice proceedings, *Myers* v. *Bethlehem Shipbuilding Corporation, supra*, 303 U. S. at 47-50, 58 S. Ct. at 462-463, and the Board's election proceedings, *Boire* v. *Greyhound Corporation*, 376 U. S. 473, 476-479, 84 S. Ct. 894, 896-898 (1964). To, ". . . allow employers and unions to rush into federal district court at will to prevent or nullify certification elections would encourage dilatory tactics by dissatisfied parties and lead to industrial unrest." *Bishop* v. *N. L. R. B.*, 502 F. 2d 1024, 1027 (5th Cir. 1974). The Circuit Courts of Appeals have applied this rule,[3]

3. *Board of Tr. of Mem. Hosp. of Fremont City* v. *N. L. R. B.*, 523 F. 2d 845, 847 (10th Cir. 1975); *National Alliance of Postal & Fed. Emp.* v. *Klassen*, 514 F. 2d 189 (D. C. Cir. 1975); *Sterling Drug, Inc.* v. *Weinberger*, 509 F. 2d 1236, 1239 (2nd Cir. 1975); *Local No. 1547, I. B. E. W.* v. *Local No. 959, I. B. T., C., W. & H., Ind*, 507 F 2d 872, 877 (9th Cir 1974); *Bishop* v. *N. L. R. B.*, 502 F. 2d 1024, 1027 (5th Cir. 1974); *Wellman Industries Inc.* v. *N. L. R. B.*, 490 F. 2d 427, 428 (4th Cir. 1974); *Communications Workers of America* v. *United Telephone Com-*

(Continued on next page)

and the lower Court's ruling that the district court lacked jurisdiction is quite routine and consistent with the foregoing precedent. Indeed to have ruled otherwise would be, ". . . at war with the long-settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers* v. *Bethlehem Shipbuilding Corporation, supra*, 303 U. S. at 50-51, 58 S. Ct. at 463.

The exceptions to this well established rule first arose in *Leedom* v. *Kyne*, 358 U. S. 184, 79 S. Ct. 180 (1958). In that case the Board included professional employees in a bargaining unit containing both professional employees and employees who were not professional, which was admitted by the Board to be contrary to the specific statutory prohibition, ". . . the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit." (29 U. S. C. 159(b)(1)). This Court ruled in *Kyne* that district courts will have jurisdiction only in a suit, ". . . to strike down an order of the Board made in excess of its delegated powers *and contrary to a specific prohibition in the Act.*" 358 U. S. at 188, 79 S. Ct. at 184 (emphasis supplied). No claim is made nor can be made here that the Board is acting "contrary to a specific prohibition in the Act" (see *e.g.*, Un. App. II, p. A11) and thus the *Kyne* exception is inapplicable. The only other exception following *Kyne* was found in *McCulloch* v. *Sociedad Nacional*, 372 U. S. 10, 83 S. Ct. 671 (1963). In *Boire* v. *Greyhound Corporation, supra*, this Court quoted from and explained the *McCulloch* decision as follows [376 U. S. at 480, 84 S. Ct. at 898]:

(Continued from preceding page)

pany of Ohio, 478 F. 2d 310, 311 (6th Cir. 1973); *Sears, Roebuck and Co.* v. *Solien*, 450 F. 2d 353, 355 (8th Cir. 1971); *Vapor Blast Manufacturing Company* v. *Madden*, 280 F. 2d 205, 208-209 (7th Cir. 1960), *cert. denied* 364 U. S. 910.

> . . . District Court jurisdiction was upheld in a situation involving the question of application of the laws of the United States to foreign-flag ships and their crews, the Court was careful to note that "the presence of public questions particularly *high in the scale of our national interest because of their international complexion* is a uniquely compelling justification for prompt judicial resolution of the controversy over the Board's power. No question of remotely comparable urgency was involved in Kyne, which was a purely domestic adversary situation. *The exception recognized today is therefore not to be taken as an enlargement of the exception in Kyne.*" 372 U. S., at 17, 83 S. Ct. at 675, 9 L. Ed. 2d 547. (Emphasis supplied.)

This Court made it clear in *Boire* and later decisions that the *Kyne* exception is narrow, confined only to situations where the Board acts "contrary to a specific prohibition in the Act," *Boire* v. *Greyhound Corporation, supra,* 358 U. S. at 188, 79 S. Ct. at 184; *Bro. of Ry & S. C.* v. *Ass'n for Ben. of Non-Con. Emp.,* 380 U. S. 650, 659-660, 85 S. Ct. 1192, 1197 (1965). As one Court of Appeals said recently:

> Until otherwise instructed we shall continue to regard *Myers* as stating the general rule and *Leedom* v. *Kyne* as being what the Supreme Court says it is—a narrow exception. *Sterling Drug, Inc.* v. *Weinberger,* 509 F. 2d 1236, 1239 (2nd Cir. 1975).

Since this matter does not involve a question of "international complexion"[4] and there is no showing of any action by the Board "contrary to a specific prohibition in the Act"[5] there exist no bases for invoking the very narrow exception to the general rule that district courts lack jurisdiction.

4. 372 U. S. at 17, 83 S. Ct. at 675.

5. 358 U. S. at 188, 79 S. Ct. at 184.

II.

THE RATIONALE OF FEDERAL LEGISLATION IN THIS AREA IS THE NLRB MUST HEAR AND DETERMINE ALL ISSUES IN THE FIRST INSTANCE.

In its early and basic interpretations of Federal labor policy, this Court made it clear that all such questions were to be resolved in a unified nationally applied scheme through the NLRB to avoid a patchwork of differing interpretations among the various states. *N. L. R. B.* v. *Hearst Publications,* 322 U. S. 111, 123, 125, 64 S. Ct. 851, 857-858 (1944).

In *Myers* v. *Bethlehem Shipbuilding Corporation, supra,* 303 U. S. at 50, 58 S. Ct. at 463 this Court said, that to give the district court jurisdiction would, "in effect substitute the District Court for the Board as the tribunal to hear and determine what Congress declared the Board *exclusively* should hear and determine *in the first instance*" (emphasis supplied). And this Court said in *N. L. R. B.* v. *Reliance Fuel Oil Corporation,* 371 U. S. 224, 226, 83 S. Ct. 312, 313 (1963):

> This Court has consistently declared that in passing the National Labor Relations Act, Congress intended to and did vest in the Board the fullest *jurisdictional* breadth constitutionally permissible under the Commerce Clause. See, *e.g.,* Guss v. Utah Labor Relations Board, 353 U. S. 1, 3, 77 S. Ct. 598, 599, 609, 1 L. Ed. 2d 601; Polish National Alliance of United States of North America v. National Labor Relations Board, 322 U. S. 643, 647-648, 64 S. Ct. 1196, 1198-1199, 88 L. Ed. 1509; National Labor Relations Board v. Fainblatt, 306 U. S. 601, 607, 59 S. Ct. 668, 672, 83 L. Ed. 1014. Compare Weber v. Anheuser-Busch, Inc., 348 U. S. 468, 480, 75 S. Ct. 480, 487, 99 L. Ed. 546. (Emphasis original.)

Upon this basic construction the Board has been deemed the appropriate agency to initially determine all questions placed before it, even those in which constitutional claims are raised. *N. L. R. B.* v. *Jones & Laughlin S. Corp.,* 301 U. S. 1, 32,

57 S. Ct. 615, 622 (1937); *Associated Press* v. *N. L. R. B.*, 301 U. S. 103, 130-131, 57 S. Ct. 650, 655 (1937); *Myers* v. *Bethlehem Shipbuilding Corporation, supra,* 303 U. S. at 49, 58 S. Ct. at 463.[6]

In addition to the cases cited immediately above the NLRB regularly has determined matters in which were raised the same constitutional religious claims as here. *Good Foods Manufacturing & Processing Corp.,* 195 NLRB 418, *enforced* 492 F. 2d 1302 (7th Cir. 1974); *Cap Santa Vue, Inc.,* 172 NLRB 1558, *enforced* 424 F. 2d 883 (D. C. Cir. 1970); *Western Meat Packers, Inc.,* 148 NLRB 444, 450, *enforcement denied on other grounds* 350 F. 2d 804 (10th Cir. 1965); *Sunday School Board of Southern Baptist Convention,* 92 NLRB 801.[7]

In 1970 the Board for the first time exercised its discretion to assert its jurisdiction over non profit, private educational institutions. *Cornell University,* 183 NLRB 329; 29 C. F. R. § 103.1. Within that category of employers are private schools operated by religious institutions. Thus there has arisen a number of cases involving various school systems of Catholic dioceses (see *infra,* p. 16, n.9; Un. App. IV, pp. A16-A17) and in such cases the Board has decided to decline jurisdiction if a school is completely religious and to assert jurisdiction if a school is substantially secular, that is, like non-religious, non-profit, educational institutions over which jurisdiction has been asserted. *Roman Catholic Archdiocese of Baltimore,* 216 NLRB 249.

6. Specifically this Court said in *Myers:*

> The order of the Board is subject to review by the designated court, and only when sustained by the court may the order be enforced. Upon that review all questions of the jurisdiction of the Board and the regularity of its proceedings, *all questions of constitutional right* or statutory authority are open to examination by the court [of appeals]. (Emphasis supplied.)

7. Indeed, in *Catholic Charities of Buffalo,* 220 NLRB No. 5 (90 LRRM 1279) the employer, of the same religious beliefs as the Employer here, "urged the Board to assert jurisdiction", yet the Board, "independently examined the record to see whether the assertion of jurisdiction is warranted."

There is every good reason that the Board should first hear and determine all labor controversies, and even those where, as here, constitutional religious issues are raised. In any matter where one claims governmental conduct to be an infringement of religious beliefs the tribunal must determine whether in fact religious beliefs are truly involved and to what extent, if at all, such beliefs will be restricted by the operation of the statute in question. *Wisconsin* v. *Yoder,* 406 U. S. 205, 215-216, 92 S. Ct. 1526, 1533 (1972). See also: *Schlesinger* v. *Councilman,* 420 U. S. 738, 755, 95 S. Ct. 1300, 1312 (1975).[8] The Board, with preferred expertise in the statute it administers, is best suited to make the initial determination of whether or not the operation of that statute will interfere or restrict the free exercise of religious beliefs. As this Court said recently in *Schlesinger* v. *Councilman,* 420 U. S. at 757, 95 S. Ct. at 312:

> The latter rule [exhaustion of administrative remedies], looking to the special competence of agencies in which Congress has reposed the duty to perform particular tasks, is based on the need to allow agencies to develop the facts, to apply the law in which they are peculiarly expert, and to correct their own errors. The rule ensures that whatever judicial review is available will be informed and narrowed by the agencies' own decisions. It also avoids duplicative proceedings, and often the agency's ultimate decision will obviate the need for judicial intervention.

See also: *Boire* v. *Greyhound Corporation, supra,* 376 U. S. at 481, 84 S. Ct. at 899 and *N. L. R. B.* v. *Hearst Publications, supra,* 322 U. S. at 130-131, 64 S. Ct. at 860.

An examination of the Board's consideration of this case shows it performed its assigned tasks precisely as Congress intended and as this Court has decreed (Un. App. IV, pp. A16-A21). What this Court recently said in *Schlesinger* v. *Councilman* as to the military court system and its ability to hear and

8. "The precise content of constitutional rights almost invariably turns on the context of fact and law in which they arise" (420 U. S. at 755, 95 S. Ct. at 1312).

determine all issues, including even constitutional claims, is precisely applicable here:

> . . . implicit in the congressional scheme embodied in the Code is the view that the military court system generally is adequate to and responsibly will perform its assigned task. We think this congressional judgment must be respected and that it must be assumed that the military court system will vindicate servicemen's constitutional rights. (420 U. S. at 758, 95 S. Ct. at 1313.)

No less can be said for the NLRB which, as shown above, in addition to its acknowledged expertise in labor controversies, has determined, with Court approval, the very same constitutional claims raised here (see *supra*, p. 10).

Upon the foregoing, past precedent is clear that the NLRB has exclusive jurisdiction to hear this matter in the first instance with respect to all issues, including the constitutional claims raised.

III.

THE EMPLOYER'S CONTENTIONS ARE WITHOUT MERIT.

The specific claims advanced by the Employer are plainly contrary to the controlling principles set forth above. It cites no authority for its claimed "rights of churches to have prompt access to courts of law at the beginning of—and not long after—the assertion of governmental power . . ." (Pet. Brief, p. 8), and, as shown above its contention is diametrically contrary to the firmly established doctrine of exhaustion of administrative remedies.

The Employer's arguments based upon the narrow exceptions of the *Kyne* and *McCulloch* decisions (Pet. Brief, pp. 8-9) have not explored fully the meaning of those cases. The Employer cannot show here any conduct by the Board which is "contrary to a specific prohibition in the Act", as required in *Kyne* and obviously this matter does not involve a question of "international complexion" as in *McCulloch* (see *supra*, pp. 7-8).

Therefore, no bases exist for this matter to be treated within the narrow exception to the rule that district courts are without jurisdiction.

The Employer next argues that its claim of religious liberty is of greater importance than any cases where district court jurisdiction was allowed and therefore this case should be a further extension of the *Kyne* exception (Pet. Brief, pp. 9-10). There is no question that religious liberty is an essential valuable right however it does not follow that said right will be lost or that those who claim it will in any way suffer from a consideration by an administrative agency, subject to judicial review. It must be assumed that a Congressionally established agency will vindicate a litigant's constitutional rights. *Schlesinger* v. *Councilman*, 420 U. S. at 758, 95 S. Ct. at 1313.

The Employer's reliance on cases where the district court was found to have jurisdiction *vis a vis* agencies other than the Board (Pet. Brief, p. 10) is misplaced. In *Weinberger* v. *Salfi*, ... U. S. ....., 95 S. Ct. 2457 (1975), cited by the Employer (Pet. Brief, p. 10), this Court found an agency's determination to have been final and therefore the district court, the appropriate court of judicial review, properly had jurisdiction (95 S. Ct. at 2468). More importantly, in *Salfi* this Court said:

> We have previously recognized that the *doctrine of administrative exhaustion should be applied with a regard for the particular administrative scheme at issue.* Parisi v. Davidson, 405 U.S. 34, 92 S.Ct. 815, 31 L.Ed. 2d 17 (1972); McKart v. United States, 395 U.S. 185, 89 S.Ct. 1657, 23 L.Ed. 2d 194 (1969). Exhaustion is generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review. (..... U. S. at ....., 95 S. Ct. at 2467, emphasis supplied.)

As we have shown in greater detail above (see *supra*, pp. 9-12), Congress intended the Board to have the fullest exclusive jurisdiction to hear and determine all matters in the first instance.

Public Utilities Commission of California v. *United States*, 355 U. S. 534, 78 S. Ct. 446 (1958) and *Aircraft & Diesel Equipment Corp.* v. *Hirsh*, 331 U. S. 752, 67 S. Ct. 1493 (1947) cited by the Employer (Pet. Brief, p. 10) are patently inapposite. First they involve different administrative schemes, and therefore cannot be relied on to interrupt the exclusive jurisdiction of the NLRB, *Weinberger* v. *Salfi, supra*, ... U. S. ....., 955 S. Ct. at 2467. Further, in *Aircraft & Diesel*, this Court said:

> Where the intent of Congress is clear to require administrative determination, either to the exclusion of judicial action or in advance of it, a strong showing is required, both of inadequacy of the prescribed procedure and of impending harm, to permit short-circuiting the administrative process. Congress' commands for judicial restraint in this respect are not lightly to be disregarded. [33 U. S. at 773-774, 67 S. Ct. at 1504].

The Employer has not shown the Board's procedure to be inadequate or any impending harm simply by litigating the issues first before the Board.

Next the employer erroneously argues that the Court of Appeals failed to treat the allegations of the Complaint as true (Pet. Brief, p. 10). As this case came before the Court only upon the Employer's complaint, the Board's motion to dismiss and the District Court's decision, the Court of Appeals obviously considered the allegations of the complaint, however it determined the matter upon the decisions of this Court that a district court lacked jurisdiction (Pet. App. B, p. A15). Nowhere in the decision below is there any suggestion that the Court ignored the complaint, as asserted by the Employer.

The Employer next claims that by raising a First Amendment issue it should be entitled to forego administrative proceedings

and the attendant costs and delays (Pet. Brief, p. 10). First it should be pointed out that absent the two unmeritorious injunction attempts (Un. App. II, pp. A7-A12, Pet. App. A) this matter may well have been presently pending in the appropriate reviewing court of appeals. Thus the Employer has to look only to himself as the cause of delay. As to costs of litigating in the administrative scheme (Pet. Brief, p. 10); or the alleged futility in appearing before an agency which has earlier established a rule of "not 'completely religious' " (Pet. Brief, p. 11); or the so-called "pernicious practice" of awaiting access to the courts until completion of the government's administrative process (Pet. Brief, p. 11); one cannot say that such costs or alleged futility are greater or less than if litigation commenced in various district courts and thereafter was reviewed in various courts of appeals. But of greater importance the appropriate administrative scheme must be observed in order to obtain a unified, nonduplicitous and efficient administration in an area where the particular agency enjoys expertise. *Weinberger* v. *Salfi, supra*, ... U. S. at ....., 95 S. Ct. at 2467; *Schlesinger* v. *Councilman, supra*, 420 U. S. at 756-757, 95 S. Ct. at 1312. As this Court said in *Myers* v. *Bethlehem Shipbuilding Corporation, supra*, 303 U. S. 51-52, 58 S. Ct. at 464:

> Obviously, the rule requiring exhaustion of the administrative remedy cannot be circumvented by asserting that the charge on which the complaint rests is groundless and that the mere holding of the prescribed administrative hearing would result in irreparable damage [note omitted]. Lawsuits also often prove to have been groundless; but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact.

Or as one Court of Appeals said:

> Irreparable harm cannot be established by a mere reliance on the burden of submitting to agency hearings. This is a risk of litigation that is inherent in society, and not the type of injury to justify judicial intervention. *Sears, Roebuck and Co.* v. *N.L.R.B.*, 473 F.2d 91, 93 (D.C. Cir. 1972).

It cannot be validly contended that this agency or any other, ". . . is without even a vestige of specialized competence in the field of constitutional law and has less than that in the field of religion" (Pet. Brief, p. 11). It must be assumed from the Congressional mandate establishing the Boad that this or any other agency "will vindicate . . . constitutional rights". *Schlesinger* v. *Councilman, supra,* 420 U. S. at 758, 95 S. Ct. at 1313. Past precedent teaches that indeed this particular agency has experience and a notable record of hearing and properly determining similar constitutional questions. *N. L. R. B.* v. *Jones & Laughlin S. Corp.,* 301 U. S. 1, 32, 57 S. Ct. 615, 622 (1937); *Associated Press* v. *N. L. R. B.,* 301 U. S. 103, 130-131, 57 S. Ct. 650, 655 (1937); *Good Foods Manufacturing & Processing Corp.,* 195 NLRB 418, *enforced* 492 F. 2d 1302 (7th Cir. 1974); *Cap Santa Vue, Inc.,* 172 NLRB 1558, *enforced* 424 F. 2d 883 (D. C. Cir. 1970); *Western Meat Packers, Inc.,* 148 NLRB 444, 450, *enforcement denied on other grounds* 350 F. 2d 804 (10th Cir. 1965); *Sunday School Board of Southern Baptist Convention,* 92 NLRB 801. In fact the Board has heard and determined a number of similar religious operated school cases in which it asserted jurisdiction and in which a claim of unconstitutional infringement of religion was raised. These matters are now being reviewed in various Courts of Appeals, upon the full record made before the Board, exactly as the statute requires.[9] No good purpose could be served by adopting the Employer's suggestion that district courts should interrupt this present orderly administrative scheme, now being reviewed in various Courts of Appeals.

9. Pending at this time before the Seventh Circuit is *The Catholic Bishop of Chicago* v. *N. L. R. B. (Illinois Education Association, Intervenor),* case no. 76-1600 to review the Board's decision reported at 224 NLRB No. 164 and *Diocese of Fort Wayne-South Bend, Ind.* v. *N. L. R. B.,* case no. 76-1638 to review Board's decision reported at 224 NLRB No. 164 on both of which oral argument took place on January 21, 1977 (Pet. App. B, pp. A9-A10). Also presently pending before the Ninth Circuit is *Cardinal Timothy Manning Roman Catholic Archbishop of the Archdiocese of Los Angeles,* v. *N. L. R. B.,* case no. 77-1286, to review the Board's decision reported at 223 NLRB No. 198.

It is ludicrous to suggest that the Board's decision is in "direct conflict" with this Court's opinion in *Lemon* v. *Kurtzman,* 403 U. S. 602, 91 S. Ct. 2105 (1971) (Pet. Brief, p. 11) because: (1) as the Board noted, there is a substantial and distinguishing difference between those statutes which have the primary effect of aiding religion and those, as here, which manifestly have no such primary effect (Un. App. IV, p. A18); and (2) "The precise content of constitutional rights almost invariably turns as the context of fact and law in which they arise".[10] Therefore, the Employer's rash and off hand conclusions with respect to difficult and different issues of fact and law must be disregarded.

Upon all the foregoing it is submitted that each point raised by the Employer is without merit, that the lower court's decision is correct and in harmony with well established precedent and therefore review by this Court is unnecessary.

CONCLUSION.

It may look and sound appealing but is of no substance to characterize this matter as a "labor case" or a "First Amendment case" (Pet. Brief, pp. 8 and 11). The inescapable fact is that a labor organization has invoked the exclusive jurisdiction of the NLRB seeking certification as the bargaining representative of an appropriate unit of employees (Un. App. I, p. A1). In another proceeding an employee has asserted his unlawful discharge for having engaged in statutorily protected activities before the only agency authorized to rule thereon (Un. App. III, p. A13). In both situations the Employer has advanced a claim of First Amendment protection. Will it help to call this a labor-First Amendment case or a First Amendment-labor case?

10. *Schlesinger* v. *Councilman, supra,* 420 U. S. at 755, 95 S. Ct. at 1312. See also: *Wisconsin* v. *Yoder, supra,* 406 U. S. at 215, 92 S. Ct. at 1533.

The past precedent is firmly established that district courts have no jurisdiction to act and that the statutory scheme is intended and is wholly adequate to develop a record upon which it will rule subject to judicial review. It is respectfully submitted that no special exceptions should be carved out simply to accomodate a particular party's defense, here First Amendment rights. Without doubt that party will be fully heard in its claim but in the Congressionally designed manner, that is in the ordinary course of the administrative scheme followed by judicial review.

It is respectfully submitted that the subject petition be denied.

Respectfully submitted,

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Counsel for Lay Teachers Federation of the Gary Diocese, Local 3493, American Federation of Teachers, AFL-CIO—One of Respondents.

Form NLRB-502
(11-64)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

Form Approved.
Budget Bureau No. 64-R002.14

PETITION

DO NOT WRITE IN THIS SPACE

CASE NO. 13-RC-13855

DATE FILED November 4, 1975

INSTRUCTIONS.—Submit an original and four (4) copies of this Petition to the NLRB Regional Office in the Region in which the employer concerned is located.
If more space is required for any one item, attach additional sheets, numbering item accordingly.

The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 9 of the National Labor Relations Act.

1. Purpose of this Petition *(If box RC, RM, or RD is checked and a charge under Section 8(b)(7) of the Act has been filed involving the Employer named herein, the statement following the description of the type of petition shall not be deemed made.)*

(Check one)

- [X] RC-CERTIFICATION OF REPRESENTATIVE —A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees.
- [ ] RM-REPRESENTATION (EMPLOYER PETITION)—One or more individuals or labor organizations have presented a claim to Petitioner to be recognized as the representative of employees of Petitioner.
- [ ] RD-DECERTIFICATION — A substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative.
- [ ] UD-WITHDRAWAL OF UNION SHOP AUTHORITY—Thirty percent (30%) or more of employees in a bargaining unit covered by an agreement between their employer and a labor organization desire that such authority be rescinded.
- [ ] UC-UNIT CLARIFICATION—A labor organization is currently recognized by employer, but petitioner seeks clarification of placement of certain employees: *(Check one)* [ ] In unit not previously certified
  [ ] In unit previously certified in Case No. _____.
- [ ] AC-AMENDMENT OF CERTIFICATION—Petitioner seeks amendment of certification issued in Case No. _____.

Attach statement describing the specific amendment sought.

2. NAME OF EMPLOYER	EMPLOYER REPRESENTATIVE TO CONTACT	PHONE NO.
SEE ATTACHED	SEE ATTACHED	SEE ATTACHED

3. ADDRESS(ES) OF ESTABLISHMENT(S) INVOLVED *(Street and number, city, State, and ZIP Code)*
SEE ATTACHED

4a. TYPE OF ESTABLISHMENT *(Factory, mine, wholesaler, etc.)*	4b. IDENTIFY PRINCIPAL PRODUCT OR SERVICE
School Systems	Education

5. Unit Involved *(In UC petition, describe PRESENT bargaining unit and attach description of proposed clarification.)*

Included: All regular full time and part time lay teachers, counselors, librarians and school nurses,

Excluded: All para-professionals, office clerical employees, janitors and maintenance employees, members of religious orders and diocesan priests, guards and supervisors as defined in the Act.

(If you have checked box RC in 1 above, check and complete EITHER item 6a or 6b, whichever is applicable)

6a. NUMBER OF EMPLOYEES IN UNIT:
PRESENT 400
PROPOSED (BY UC/AC) _____

6b. IS THIS PETITION SUPPORTED BY 30% OR MORE OF THE EMPLOYEES IN THE UNIT?*
[X] YES [ ] NO
*Not applicable in RM, UC, and AC

7a. [X] Request for recognition as Bargaining Representative was made on September 12, 1975 *(Month, day, year)* and Employer declined recognition on or about no reply *(If no reply received, so state)* *(Month, day, year)*

7b. [ ] Petitioner is currently recognized as Bargaining Representative and desires certification under the act.

8. Recognized or Certified Bargaining Agent *(If there is none, so state)*

NAME	AFFILIATION
None	
ADDRESS	DATE OF RECOGNITION OR CERTIFICATION

9. DATE OF EXPIRATION OF CURRENT CONTRACT, IF ANY *(Show month, day, and year)*

10. IF YOU HAVE CHECKED BOX 10D IN 1 ABOVE, SHOW HERE THE DATE OF EXECUTION OF AGREEMENT GRANTING UNION SHOP *(Month, day, and year)*

11a. IS THERE NOW A STRIKE OR PICKETING AT THE EMPLOYER'S ESTABLISHMENT(S) INVOLVED? YES ..... NO X

11b. IF SO, APPROXIMATELY HOW MANY EMPLOYEES ARE PARTICIPATING?

11c. THE EMPLOYER HAS BEEN PICKETED BY OR ON BEHALF OF ..... *(Insert name)* A LABOR ORGANIZATION, OF ..... *(Insert address)* SINCE ..... *(Month, day, year)*

12. ORGANIZATIONS OR INDIVIDUALS OTHER THAN PETITIONER (AND OTHER THAN THOSE NAMED IN ITEMS 8 AND 11c), WHICH HAVE CLAIMED RECOGNITION AS REPRESENTATIVES AND OTHER ORGANIZATIONS AND INDIVIDUALS KNOWN TO HAVE A REPRESENTATIVE INTEREST IN ANY EMPLOYEES IN THE UNIT DESCRIBED IN ITEM 5 ABOVE. (IF NONE, SO STATE.)

NAME	AFFILIATION	ADDRESS	DATE OF CLAIM *(Required only if Petition is filed by Employer)*
None			

I declare that I have read the above petition and that the statements therein are true to the best of my knowledge and belief.

LAY TEACHERS FEDERATION OF THE GARY DIOCESE, AMERICAN FEDERATION OF TEACHER
(Petitioner and affiliation, if any)

By /s/ ROBERT MADSEN Chairman
(Signature of representative or person filing petition) *(Title, if any)*

Address 3618 176th Place, Lansing, Illinois 60438 474-8965
(Street and number, city, State, and ZIP Code) *(Telephone number)*

WILLFULLY FALSE STATEMENT ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

GPO 923-779

APPENDIX I.

A1

A3

ATTACHMENT

Diocese of Gary, Indiana—and the following:

Father Foverbough
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Hammond, Indiana 46320
Phone: 932-0427

Holy Name Church
Rev. Julian Jercha
11000 W. 133rd Avenue
Cedar Lake, Indiana 46303
Phone: 374-7160

St. Patrick Church
Rev. Stephen Vrabely
312 W. Indiana Avenue
Chesterton, Indiana 46304
Phone: 926-1282

St. Mary Church
Msgr. Vincent Lengerich
321 E. Joliet Street
Crown Point, Indiana 46307
Phone: 663-0044

St. Joseph Church
Msgr. Edward Litot
440 Joliet Street
Dyer, Indiana
Phone: 865-2271

Holy Trinity Church
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4752 Carey Street
East Chicago, Indiana 46312
Phone: 330-4061

Immaculate Conception Church
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East Chicago, Indiana 46312
Phone: 398-0210

St. Mary Church
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East Chicago, Indiana 46312
Phone: 398-0189

St. Stanislaus Church
Rev. Joseph Niezgoda
805 W. 150th Street
East Chicago, Indiana 46312
Phone: 398-2341

St. Francis Xavier Church
Msgr. Paul Haney
2453 Putnam
East Gary, Indiana 46405
Phone: 362-1411

Blessed Sacrament Church
Rev. ..... Madejczyk
4101 Garfield Street
Gary, Indiana 46408
Phone: 380-3081

Holy Angels Cathedral
Rev. Don C. Grass
640 Tyler Street
Gary, Indiana 46402
Phone: 882-6079

Holy Family Church
Rev. Stanley Milewski
416 East Ridge Road
Gary, Indiana 46409
Phone: 884-1733

Holy Trinity Church
Rev. Joseph Viater
425 W. 12th Avenue
Gary, Indiana 46407
Phone: 882-1840

St. Ann Church
Rev. John Minnich
6025 W. 25th Avenue
Gary, Indiana 46406
Phone: 844-2448

St. Hedwig Church
Rev. Hilary Halter
1724 Pennsylvania Street
Gary, Indiana 46407
Phone: 882-2584

St. Joseph the Worker Church
Rev. Benadict Benakovic
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Phone: 884-2810

St. Mark Church
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Phone: 887-0514

St. Mary of the Lake Church
Rev. Ralph Hoffman
6060 Miller Avenue
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Phone: 938-1373

St. Monica Church
Rev. William Martin
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Gary, Indiana 46407
Phone: 883-1861

St. Mary Church
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Griffith, Indiana 46319
Phone: 838-4163

Our Lady of Perpetual Help
Rev. Timothy Doody
7104 Arizona Avenue
Hammond, Indiana 46323
Phone: 844-3438

St. Casimir Church
Rev. Anthony Balczun
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Hammond, Indiana 46327
Phone: 931-2589

St. Catherine of Siena
Rev. Dominic Pallone
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Phone: 845-1939

St. John Bosco
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Our Lady of Grace Church
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Phone: 838-1484

St. Bridget Church
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St. Thomas Aquinas Church
Rev. Emil Bloch
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St. Andrew Church
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St. Michael Church
Rev. Michael Evanick
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SS. Peter & Paul Church
Msgr. Casimir E. Senderak
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Notre Dame Church
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Queen of All Saints Church
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St. Thomas More Church
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Nativity of Our Savior Church
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Sacred Heart Church
Rev. F. Raymond Fowerbaugh
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Whiting, Indiana 46394
Phone: 659-0733

St. Adalbert Church
Rev. Joseph P. Smith
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Whiting, Indiana 46394
Phone: 659-3848

St. John the Baptist Church
Rev. Edward Homco
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Whiting, Indiana 46394
Phone: 659-0023

St. John Cantius Church
Rev. Michael Tomaszewski
3901 Main Street
East Chicago, Indiana 46312
Phone: 398-1370

St. Patrick Church
Rev. Phillip Fusco
3810 Grand Blvd.
East Chicago, Indiana 46312
Phone: 398-1036

St. Francis of Assisi Church
Rev. Ignatius C. Vichuras
3905 Fir Street
East Chicago, Indiana 46312
Phone: 397-1885

Our Lady of Guadalupe Church
Rev. Thomas Hunt
3522 Deadar Street
P. O. Box 3400
East Chicago, Indiana 46312

Assumption Church
Rev. John P. Zubak
4001 Fir Street
East Chicago, Indiana 46312
Phone: 398-1023

APPENDIX II.

UNITED STATES DISTRICT COURT

Northern District of Indiana

Hammond Division

ANDREW G. GRUTKA, as Bishop of the Catholic Diocese of Gary, Indiana,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD Region 13, LAY TEACHERS FEDERATION OF GARY DIOCESE, AMERICAN FEDERATION OF TEACHERS,
Respondents.
} No. H 75-251

ORDER AND MEMORANDUM

The Court is presented with a motion to dismiss filed by the defendant, National Labor Relations Board, pursuant to Federal Rules of Procedure 12(b). The Court has studied the memoranda filed by both plaintiff and defendant, and GRANTS the defendant's motion to dismiss.

The Court assumes jurisdiction pursuant to 28 U. S. C., § 2284.

FACTS

On October 21, 1975 plaintiff, Andrew G. Grutka, Bishop of the Catholic Diocese of Gary, Indiana, was informed by a priest, under the ecclesiastical jurisdiction of plaintiff, that he had been served with a petition for certification of representation by the National Labor Relations Board, Region 13, along with a notice

of representation hearing to be held by the Board. On October 24, 1975, plaintiff filed with the Board a motion for continuance followed on October 28, 1975 by a motion to dismiss. On October 30, 1975 the Board granted the motion for a continuance, but in a subsequent ruling on November 5, 1975 denied plaintiff's motion to dismiss. On November 6, 1975 plaintiff was notified that some 49 of the pastors of the Catholic parishes in the Diocese of Gary were served with a second amended petition for certification of representation. Plaintiff then petitioned this Court to convene a three judge court pursuant to 28 U. S. C., § 2284 and to grant a temporary restraining order. Plaintiff's petition along with a supplemental motion to convene a three judge court, alleges that Chapter 7 of the Labor Management Relations Act, 29 U. S. C. § 141 et seq., and all rules and regulations promulgated pursuant thereto, as applied by the defendants, constitutes a violation of the rights of plaintiff under the establishment and free exercise clauses of the First Amendment of the Constitution, as well as a violation of plaintiff's rights guaranteed by the Fifth and Ninth Amendments of the Constitution of the United States.

On November 17, 1975 this Court granted plaintiff's request for a temporary restraining order enjoining the defendants in this case from taking further action in the Board's proceedings entitled United States of America, National Labor Relations Board, Diocese of Gary, Indiana, Employer, and Lay Teachers Federal of Gary Diocese, American Federation of Teachers, petitioner, case number 13-RC-13855, "Representation Petition", and case number 13-CA 14813, "Charge against Employer", and in the Catholic Schools of the Diocese of Gary until further order of this Court.

The defendant, National Labor Relations Board, filed a motion to dismiss plaintiff's motion to convene a three judge court pursuant to Federal Rules of Civil Procedure 12(b), alleging lack of subject matter jurisdiction, or, in the alternative to grant summary judgment in its favor.

ANALYSIS AND CONCLUSIONS

In its memorandum in support of its motion to dismiss the National Labor Relations Board alleges that this Court is without subject matter jurisdiction. In support of this contention the defendant, National Labor Relations Board, goes to great lengths in presenting the argument, with cases in support thereof, that only under extraordinary circumstances does a district court have the power to review the Board's representation proceedings. The Board has failed to carefully peruse plaintiff's application to convene a three judge court. In his motion, plaintiff alleges not only that the Board's representation proceedings are unconstitutional but he also alleges the enabling statute itself, the Labor Management Relations Act, is unconstitutional as applied. Such an allegation, along with his request for equitable relief, takes plaintiff's motion outside of the Board's argument and makes it an application to convene a three judge court under 28 U. S. C., § 2282. Once such an application is made a district judge, sitting alone, has the power to initially determine whether the complaint formally alleges a basis for equitable relief, whether the constitutional question presented is substantial and whether the case presented otherwise comes within the requirements of the applicable three judge statute. *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U. S. 713 (1962).

The Board further argues that plaintiff's application fails to satisfy the requirements of 28 U. S. C., § 2282, in that it basically seeks to challenge, not the Labor Management Relations Act, but the administrative decision of National Labor Relations Board. In this conclusion this Court must concur.

To enjoin the enforcement of a federal statute under the three judge court legislation, petitioner must seek to restrain the enforcement, operation or execution of any Act of Congress repugnant to the Constitution of the United States. See 28 U. S. C., § 2282. In construing the three judge court legislation the courts have long since held that these statues must be read

not as a measure of broad social policy to be construed with great liberality, but as an enactment technical in the strict sense of the term and to be applied as such. *Mitchell* v. *Donovan*, 398 U. S. 427 (1970); *Swift & Co.* v. *Wickham*, 382 U. S. 111 (1965); and *Phillips* v. *United States*, 312 U. S. 246 (1940). In following this strict interpretation of the act the Courts have generally held that a three judge court need not be convened merely to hear constitutional challenges to federal administrative action as distinguished from Acts of Congress. *Jameson and Co.* v. *Morgenthau*, 307 U. S. 171 (1938); *National Student Association* v. *Hershey*, 412 F. 2d 1103 (D .C. Cir. 1969); *Sardino* v. *Federal Reserve Bank of New York*, 361 F. 2d 106 (2d Cir. 1966); *Anderson* v. *International Revenue Service*, 371 F. Supp. 1278 (D. C. Wyo. 1974).

The plaintiff, in his memorandum, argues that no action thus far taken by the National Labor Relations Board is the formal object of his complaint. Instead, plaintiff contends that his application to convene a three judge court is directed at the constitutionality of the Labor Management Relations Act as applied. In support of his argument plaintiff cites *Flast* v. *Cohn*, 392 U. S. 83 (1968), *Zemel* v. *Rusk*, 381 U. S. 1 (1964).

Plaintiff's memo arguments do not correlate well with his application to convene a three judge court. In paragraph 11 and 12 of plaintiff's application for temporary restraining order and for a preliminary and permanent injunction filed with this Court on November 10, 1975 reference is made to the actions of the National Labor Relations Board in attempting to take jurisdiction over plaintiff's schools. Such action plaintiff alleges constitutes an excessive entanglement of government and religion in violation of the First Amendment to the Constitution of the United States. In a supplemental motion to convene a three judge court filed with this Court on November 20, 1975 plaintiff again notes that it is the action of the National Labor Relations Board in attempting to enforce, operate, and execute the Labor Management Relations Act that constitutes a violation

of plaintiff's First Amendment rights as well as a violation of his rights guaranteed by the Fifth and Ninth Amendments to the Constitution of the United States. Clearly, it is the acts of the Board that are the formal object of plaintiff's complaint. As outlined above, an application to enjoin such actions of a Federal Administrative Agency is not sufficient to convene a three judge court.

In spite of petitioner's own description of the problem as occurring as a result of administrative action, he still maintains that his application is directed at the Labor Management Relations Act as applied. Yet nowhere in his complaint does he assail a provision of the act as giving rise to a constitutional problem. Instead, he cites *Zemel* and *Flast* as authority for his position that by merely alleging an act to be unconstitutional as applied a three judge court must be convened. A close examination of both *Zemel* and *Flast* reveals that neither case supports plaintiff's position. In *Zemel* the appellant specifically attacked the Passport Act of 1926 and § 215 of the Immigration and Nationality Act of 1952 on the grounds that they contain no standards and are therefore an invalid delegation of legislative power. The Supreme Court held this allegation cannot be brushed aside as an attack upon the actions of the Secretary because in arguing invalid delegation, appellant has quite clearly assailed the statutes themselves. In *Flast*, where *Zemel* was cited as controlling authority, appellant's constitutional attack focused on the statutory criteria which state and local authorities must meet to be eligible for federal grants under § 205 of the Elementary and Secondary Education Act of 1965. Thus, although the appellants in *Flast* challenged the constitutionality of administrative action taken under the act, they also *clearly* challenged the act itself. Nowhere in his application or supplemental motion to convene a three judge court does the plaintiff in this case clearly assail the act itself. Instead, plaintiff merely alleges the Labor Management Relations Act is unconstitutional as applied by the National Labor Relations Board without

making a constitutional attack upon any provision of the act. Such an approach would, as the court concluded in *Sardino* v. *Federal Reserve Bank of New York, supra,* improperly require cumbersome three judge court procedure in cases where the court would be bound to interpret the legislative mandate as not authorizing the administrative action and leave the constitutionality of the Act of Congress untouched.

Further, the granting of plaintiff's application would permit anyone, against whom federal administrative action appears to be unconstitutional, to convene a three judge court by merely alleging the enabling statute to be unconstitutional as applied. Such is not the intent of 28 U. S. C., § 2282, which the courts, as outlined above, have held must be strictly construed. Nor can it be said the Supreme Court intended such a result with its precedent setting decision in *Zemel* where it upheld the granting of a three judge court only after a showing that appellants had *clearly* assailed the statutes themselves.

Finally, because petitioner has failed to clearly assail an Act of Congress as required by 28 U. S. C., § 2282, this Court need not reach the question of whether plaintiff has presented a substantial constitutional question and instead must deny his application to convene a three judge court.

Enter February 12, 1976.

/s/ ALLEN SHARP
Judge, United States District Court.

FORM NLRB-501
(2-67)

Form Approved
Budget Bureau No. 64-R001.12

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

First Amended CHARGE AGAINST EMPLOYER

INSTRUCTIONS: File an original and 4 copies of this charge with NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

DO NOT WRITE IN THIS SPACE

Case No. 13-CA-15445

Date Filed May 19, 1976

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer: Diocese of Gary, Indiana

b. Number of Workers Employed:

c. Address of Establishment (Street and number, city, State, and ZIP code): 1441 Hoffman St., Hammond, Indiana

d. Employer Representative to Contact: Rev. F. Powerbough

e. Phone No.: [219] 932-0427

f. Type of Establishment (Factory, mine, wholesaler, etc.): School System

g. Identify Principal Product or Service: Elementary & High School Education

h. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (3) and (4) (List subsections) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

A. Since on or about November 20, 1975 and continuing to date, the above named employer, by its officers, agents and supervisors:

1. Threatened its employees with the school closings and attendant loss of employment if the employees supported the Lay Teachers Federation of the Gary Diocese, Local 3493, AFT;

2. Promised employees benefits and job security(i)if they disaffiliated from the American Federation of Teachers and/or(ii)if they formed an independent union under and within the authority of the Bishop of the Gary Diocese and;

3. Threatened its employees with adverse consequence if they continued to remain affiliated with the American Federation of Teachers and/or refused to form another union under and within the authority of the Bishop of the Gary Diocese.

B. On or about February 24, 1976 the above named employer, by Rev. F. Powerbough, discharged employee Robert A. Madsen because:(1)said employee engaged in protected and concerted activities;and(2)said employee is the president of the Lay Teachers Federation of the Gary Diocese, Local 3493, AFT;and(3)the Lay Teachers Federation of the Gary Diocese, Local 3493, AFT filed an NLRB petition for certification in Case No. 13 RC13855

By the foregoing and other acts and conduct, the above named employer violated its employees' rights under Section 7 of the Act and violated Section 8(a)(1)(3) and (4) of the Act.

By the above and other acts, the above-named employer has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act.

3. Full Name of Party Filing Charge (If labor organization, give full name, including local name and number)

3. Full Name of Party Filing Charge (If labor organization, give full name, including local name and number)

Robert A. Madsen

4a. Address (Street and number, city, State, and ZIP code) | 4b. Telephone No.

3618 176th Place, Lansing, Illinois 60438 | 474-8965

5. Full Name of National or International Labor Organization of Which It Is an Affiliate or Constituent Unit (To be filled in when charge is filed by a labor organization)

6. DECLARATION

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

Charles Orlove
By Jacobs, Burns, Sugarman & Orlove — Attorney
(Signature of representative or person filing charge) (Title, if any)

Address 201 North Wells St., Suite 1900 — 372-1646 (Telephone number) — May 18, 1976 (Date)

WILLFULLY FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

GPO 765-071

APPENDIX III.

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APPENDIX IV.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

ANDREW G. GRUTKA, Bishop of the Roman Catholic Diocese of Gary, Indiana,[1] *Employer,* and LAY TEACHERS FEDERATION OF THE GARY DIOCESE, LOCAL 3493, AMERICAN FEDERATION OF TEACHERS,[1] *Petitioner.*	Case No. 13-RC-13855

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,[2] the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.[3]

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1. The names of the Employer and the Petitioner appear as correctly reflected in the record.

2. The briefs submitted by the parties have been carefully considered. In keeping with the parties' post-hearing Stipulation, that Stipulation is hereby received as Union Exhibit No. 33 and has been considered as part of the record herein.

3. At the hearing, the Employer renewed its Motion to Dismiss the Petition for lack of jurisdiction. The hearing officer referred the

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2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.[4]

(Continued from preceding page)

Motion to the undersigned for ruling. For the reasons set forth hereinafter, the Employer's Motion to Dismiss is hereby denied. The Employer also moved, at the hearing, that this proceeding be transferred directly to the Board for decision. Because I conclude that this proceeding does not raise questions which must be decided by the Board in the first instance, the Employer's request to transfer this proceeding to the Board is hereby denied.

4. The Employer operates 44 elementary schools, one junior high school and three high schools within the geographical boundaries of the Diocese of Gary, Indiana. The Petitioner seeks to represent certain employees who are employed at those schools.

The Employer contends, as noted above, that this case should be dismissed because the Board is without jurisdiction. Specifically, the Employer contends that assertions of jurisdiction by the Board would deprive it of valuable property rights in contravention of the Due Process Clause of the Fifth Amendment. However, it is now well settled that the provisions of the Act do not contravene the Fifth Amendment. *N. L. R. B.* v. *Jones & Laughlin Steel Corporation*, 301 U. S. 1.

The Employer also contends that assertion of jurisdiction by the Board would violate the Religion Clauses of the First Amendment, in that assertion of jurisdiction would cause governmental entanglement in the affairs of the church. In *Cap Santa Vue, Inc.* v. *N. L. R. B.*, 424 F. 2d 883 (C. A. D. C.), the Court, in enforcing the Board's decision (172 NLRB 1558), pointed out that case law has long distinguished between the freedom to hold religious *beliefs*, and *conduct* based upon religious beliefs. It reaffirmed that conduct is subject to regulation for the protection of society, citing therein, *Braunfield* v. *Brown*, 366 U. S. 599; *Cantwell* v. *Connecticut*, 310 U. S. 296; *Reynolds* v. *United States*, 98 U. S. 145. The Court in *Cap Santa Vue, supra*, held that despite the employer's religious beliefs, the employer's conduct was subject to regulation by the provisions of the Act. Thus, the Employer herein may not successfully argue that its conduct is immune from regulation of the government by reason of the First Amendment, because its conduct may be based upon religious belief.

The undersigned is of the opinion and finds that the Employer is subject to the Board's exercise of its jurisdiction in this case because a compelling governmental interest exists for the regulation of conduct set forth in the Act. The compelling interest is set forth in Section 1 of the Act, and is directed at the avoidance of industrial strife which interferes with the free flow of commerce and with the pro-

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3. The labor organization(s) involved claim(s) to represent certain employees of the Employer.

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duction of articles and commodities for commerce. See *Cardinal Timothy Manning, Roman Catholic Archbishop*, 223 NLRB No. 198; *Henry M. Hald High School Association*, 213 NLRB No. 54; *Cap Santa Vue, Inc., supra*. In sum, it is settled that conduct based upon religious belief is subject to governmental regulation, and compelling governmental interests justify the existence of the regulatory scheme prescribed by the Act. Thus, the Employer's contention that assertion of jurisdiction by the Board would violate its First Amendment rights is without merit.

The Employer also argues that the Board should refrain from exercising jurisdiction in this case because the schools it operates are "completely religious" in nature. It is the Board's policy to decline jurisdiction over institutions only when they are completely religious, not just religiously associated. *Cardinal Timothy Manning, Roman Catholic Archbishop, supra; Roman Catholic Archdiocese of Baltimore*, 213 NLRB No. 54.

The evidence regarding this issue shows that students who attend the elementary schools maintained by the Employer often start the day by attending mass, and prayers are said before and after meals in the school cafeteria. The day closes with prayer. Students who attend the high school often begin each class with prayer. The schools and classrooms are adorned with religious statues, pictures and other religious matter. Religious holidays are observed, and the subject of Religion is taught. All schools also teach admittedly non-religious subjects such as Reading, Mathematics, English, Social Studies, Science, Music and other subjects. Non-religious textbooks are used, and the subjects are taught using non-religious methods. Specific instruction concerning the subject of Religion is limited to about 45 minutes per day for elementary school children. High school students are required to take courses such as Theology and the Old Testament. Religious nuns and priests as well as lay teachers provide instruction to the students. Less than 1 percent of the students who graduate from the Employer's schools become religious nuns or priests.

Based upon the foregoing, it is clear that the nature of the schools is not completely religious. The schools perform the secular function of educating children and only concern themselves in part with religious instruction. That prayers are recited and classrooms are religiously adorned does not negate the secular functions performed by the schools. "That the [Employer] seeks to provide an education based on Christian principles does not lead to a contrary conclusion. Most religiously associated institutions seek to operate in conformity with their religious tenets." *Roman Catholic Archdiocese of Baltimore, supra*, Slip Op. p. 5. Because the schools are not completely

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4. A question affecting commerce exists concerning the representation of certain employees of the Employer within

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religious in nature, the Board will not decline to assert jurisdiction merely because they are religiously associated. *Cardinal Timothy Manning, Roman Catholic Archbishop, supra; The Catholic Bishop of Chicago, A Corporation Sole,* 220 NLRB No. 63; *Roman Catholic Archdiocese of Baltimore, supra.*

In its brief, the Employer cites *Meek* v. *Pittinger,* ..... U. S. .....; 44 L. Ed. 2d 217 and *Lemon* v. *Kurtzman,* 403 U. S. 602, in support of its argument that the schools are completely religious and the government entanglement is barred by the Religion Clause of the First Amendment. However, those cases are clearly distinguishable. In both cases, the Supreme Court regarded the state statutory schemes there at issue as having the primary effect of aiding religion. The Act has no such primary effect. Further, the Supreme Court held that the state statutory schemes designed to lessen the primary effect of aiding religion unconstitutionally entangled the states in the *manner* in which classes at the religiously associated schools would be conducted. Again, the Act will cause no such entanglement.

Next, the Employer contends that the Board lacks jurisdiction because each school is a separate employer, and that the individual schools do not meet the Board's monetary jurisdictional standards. The Petitioner, on the other hand, contends that all the schools collectively constitute a single employer headed by the Bishop of the Roman Catholic Diocese of Gary, Indiana.

The record shows that the Diocese of Gary, Indiana includes the counties of Lake, Porter, Starke and LaPorte, all located in the State of Indiana. The Diocese is governed by Bishop Andrew G. Grutka, who has ultimate authority over all religious matters pertaining to the Diocese, including the educational mission of the Church. The Bishop has the sole ultimate right to determine what will be taught in the diocesan schools, and the manner in which it will be taught. The Bishop also has the sole ultimate right to determine the terms and conditions of employment of employees, classroom size, and whether or not a school should be opened or closed. As pointed out above, there are 44 elementary schools, one junior high school, and three high schools currently in operation within the Diocese. The Bishop holds title to all of the real property, including the schools, that is owned by the Church within the Diocese. Before a school can be built, and before substantial capital expenditures can be made on existing schools, the Bishop's required approval is sought.

The Diocese is divided into various parishes. Each elementary school is financially supported by a particular parish, except that one elementary school is financially supported by several parishes. Each

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the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

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elementary school is funded either by tuition charged to its students or by contributions of the parish which come from voluntary contributions of the parishioners, or both. The Bishop does not "give" money to the parishes for the operation of the elementary school, although the Bishop has "loaned" money to a parish for use in its elementary school. However, the Bishop does directly provide funds for the operation of the three high schools.

The Bishop has delegated his authority over the schools to the Superintendent of Schools. The Superintendent of Schools acts as a liaison between the schools and the Bishop. The Superintendent has a supporting staff which consists of an Assistant Superintendent, a secretary and a bookkeeper. There also exists a nine member Gary Diocesan School Commission.

The office of the Superintendent of Schools has devised a document entitled "Administration and Policies of Diocese of Gary, Indiana". A provision is contained in each employment contract signed by the lay teachers wherein the teachers agree to abide by the terms of the document named above. The Administration and Policies promulgated by the Superintendent contains, *inter alia,* the following information: the names and address of the members and *ex officio* members of the Gary Diocesan School Commission, and its constitution and policies, a description of the responsibilities of the Superintendent; a description of the functions of the pastor, school principal and teacher; a school calendar; teacher certification requirements; teacher application for employment forms; salary and benefits schedule for teachers and principals; the employment contract form used by teachers and the schools; an outline of benefits; teacher evaluation and other forms; bookkeeping forms and codes; textbook recommendations and suggested curricula and other matters. An individual school may deviate from the policies contained in the above described document, except that salary schedules are considered binding upon all schools within the Diocese.

The office of the Superintendent maintains files of teacher applicants and conducts initial interviews of applicants. Applicants are then referred to a particular school, as needed, for additional interviewing. The office of the Superintendent also maintains files which consist of financial budgets for some elementary schools, copies of the employment contracts of all lay teachers and other records. On at least one occasion, the Superintendent has initiated the discharge of a lay teacher.

The Superintendent's office also publishes a newsletter entitled "Diogram, Diocese of Gary Schools Weekly Telegram". The Diogram is distributed to all teachers and principals. It normally sets

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5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining

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forth a calendar of school-related events such as teacher evaluation committee meetings and testing program committee meetings. It reports on events such as meetings held by the Diocesan School Commission with lay teacher representatives concerning lay teacher compensation and benefits. The newsletters often have an article entitled "From the Office of the Superintendent . . ." which contains news and reminders of deadlines and procedures.

Members of the School Commission are appointed by the Bishop. The Commission acts as an advisory body to the Bishop on school policy matters. It regularly meets and considers matters of school policy, and advises the Bishop on such matters. It reviews the operating budgets of the three high schools. The budgets are then sent to the Bishop for final approval.

Salary schedules are determined by the Bishop after discussions among the teachers, pastors, principals, and the School Commission. The salary schedules are the same for all schools within the Diocese. All employees enjoy the same insurance benefits, except for the employees of one high school, and all lay employees enjoy the same retirement benefits.

The contract of employment for all lay teachers is signed by the teacher, the principal, the pastor, and the Superintendent. Under the contract, the teacher agrees to be available for 175 instructional days, two days prior to the opening of school, two parent conference days, two in-service days, two record days, and two days after teaching days in June. The contract further provides that teachers will be given 10 days without loss of salary for personal illness and two days for personal and/or business matters without loss of salary. Teachers also are allowed a certain amount of time off in the event of critical illness, the death or funeral of a member of the teacher's immediate family, without loss of salary. The contract also provides that the Superintendent may terminate the contract at any time for ". . . incompetency, immorality, insubordination, inability to perform on the part of the teacher, or for any other justifiable cause. . . ." However, the contract provides the teacher with the opportunity to be heard by the "Diocesan School Office" on such charges, and that the finding of the Superintendent ". . . shall be final and binding upon both Teacher and School."

Teachers may present grievances to the Superintendent and the Bishop for adjustment or assistance.

The Bishop has delegated the administration of the elementary schools to the parish pastors. All schools have a principal, who is responsible for the day to day functioning of the schools.

Each school sets its own tuition rates, if any, hires and pays its

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within the meaning of Section 9(b) of the Act:[5]

All full-time and regular part-time lay teachers, counsellors, librarians and school nurses, including department heads, employed by the Employer at its schools

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own teachers, devises its own curriculum and maintains its own handbook of school policies, except that tuition for the three high schools needs the Bishop's approval.

It is readily apparent, based upon the facts set forth above, that the Employer maintains a significant degree of control over the schools, and over the terms and conditions of employment of the lay teachers employed at the schools. Furthermore, it holds itself out to the public as an integrated enterprise. Accordingly it may be considered as such for the purposes of assertion of the Board's jurisdiction. *Cardinal Timothy Manning, Roman Catholic Archbishop, supra; Roman Catholic Diocese of Brooklyn,* 221 NLRB No. 136; *Roman Catholic Archdiocese of Baltimore, Archdiocese High School, supra.*

The parties stipulated that all of the schools involved herein collectively had gross revenues of about $7 million for the past year, and during the same period of time purchased goods and services valued in excess of $50,000 directly from points outside the State of Indiana. Because the Employer's operations have a substantial impact upon interstate commerce, I find that it will effectuate the purposes of the Act to assert jurisdiction herein. *Cardinal Timothy Manning, Roman Catholic Archbishop, supra; Roman Catholic Archdiocese of Baltimore, supra.*

5. The parties are in agreement as to the persons to be included in and excluded from the unit. However, the Employer contests the appropriateness of the diocese-wide unit sought by the Petitioner. It maintains that the only appropriate unit is one limited to each individual school.

In determining whether a unit is appropriate for purposes of collective bargaining, the Board will examine all of the relevant circumstances to determine whether the employees in the unit sought enjoy a sufficient community of interest. "There is nothing in the statute which requires that the unit for bargaining be the only appropriate unit, or the ultimate unit, or the most appropriate unit, the Act requires only that the unit be 'appropriate' " *Morand Brother Beverage Co.,* 91 NLRB 409, 418, *enf'd.* 190 F. 2d 576 (C. A. 7, 1951).

Many of the facts relevant to the issue of the appropriateness of the unit sought by the Petitioner have already been set forth above. Additionally, while there is no interchange of teachers among the schools within the Diocese, all teachers within the Diocese have, in the past, regularly attended diocesan wide meetings which concerned school matters.

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listed in Appendix A; but excluding all persons engaged as teachers in the Confraternity of Christian Doctrine Program, all substitute teachers, all paraprofessional employees, office clerical employees, janitors and maintenance employees, members of religious orders, priests and nuns, and guards and supervisors as defined in the Act.

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The record shows that some of the schools are in relatively close geographic proximity to each other, and, as pointed out above, the unit sought by the Petitioner includes all the schools within the boundaries of Diocese of Gary, except for one school which the parties stipulated should be excluded.

It is apparent that teachers at all of the schools perform similar functions for the Employer under similar working conditions, as pointed out above. Finally, no labor organization seeks a smaller unit, and there is no history of collective bargaining as to any of the unit employees.

Based upon the record as a whole, and specifically because the unit sought by the Petitioner is co-extensive with the Employer's geographical boundaries, all employees within the unit sought enjoy common benefits and conditions of employment, perform similar functions, share common interests, and work under the direction of the same higher level authorities, and because no union is seeking a smaller unit, I find that a unit consisting of employees of all schools operated by the Employer within the Diocese of Gary, Indiana, as listed in Appendix A attached hereto, but excluding St. Michael's Byzantine School, Merrillville, Indiana, constitute a unit appropriate for purposes of collective bargaining. See *Cardinal Timothy Manning, Roman Catholic Archbishop, supra.*

6. In its Brief, the Petitioner requests that an election be conducted before the end of the school year. However, I cannot direct that an election be held before the end of the school year inasmuch as this would interfere with the parties' right to request review of this decision under Section 102.67 of the Board's Rules and Regulations, Series 8, as amended, if they choose to exercise such right. Because it appears that employees in the voting unit may not be present during the summer months, I direct that, in the event that an election cannot be held before the end of the school year, the election shall not be conducted until after the commencement of the next academic year. *Fordham University,* 193 NLRB 134; *Tusculum College,* 199 NLRB 28.

Should deferral of the election to the next academic year be necessary, such election shall be held among employees in the appropriate unit who are employed during the payroll period immediately preceding the date of the issuance of the Notice of Election. *Tusculum College, supra.*

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election dates and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by Lay Teachers Federation of the Gary Diocese, Local 3493, American Federation of Teachers.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.,* 156 NLRB 1236 (1966); *N. L. R. B.* v. *Wyman-Gordon Company,* 394

U. S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, 2 copies of an election eligibility list, containing the names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned Regional Director who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the 13th Region, 219 S. Dearborn St., Chicago, Illinois on or before May 28, 1976. No extension of time to file this list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1717 Pennsylvania Avenue, NW., Washington, D. C. 20570. This request must be received by the board in Washington by June 3, 1976.

Dated May 21, 1976 at Chicago, Illinois.

/s/ ALEX V. BARBOUR
Regional Director, Region Thirteen

APPENDIX A

Holy Name School
13209 Schneider Street
Cedar Lake, Indiana 46303

St. Mary School
321 East Joliet Street
Crown Point, Indiana 46307

Holy Trinity School
4742 Carey Street
East Chicago, Indiana 46312

Indiana Harbor Catholic Elementary School
3916 Pulaski Street
East Chicago, Indiana 46312

St. Mary School
816 West 144th Street
East Chicago, Indiana 46312

St. Francis Xavier School
2453 Putnam
East Gary, Indiana 46405

Holy Angels Cathedral School
975 West 6th Avenue
Gary, Indiana 46402

Holy Trinity
423 West 12th Avenue
Gary, Indiana 46407

St. Hedwig School
1701 Connecticut Street
Gary, Indiana 46407

St. Mark School
511 West Ridge Road
Gary, Indiana 46408

St. Monica School
2254 Adams Street
Gary, Indiana 46407

St. Casimir School
4329 Cameron Avenue
Hammond, Indiana 46327

St. John Bosco
1231 - 171st Place
Hammond, Indiana 46324

St. Patrick School
640 North Calumet Road
Chesterton, Indiana 46304

St. Joseph School
432 Joliet Road
Dyer, Indiana 46311

Immaculate Conception School
4860 Olcott Avenue
East Chicago, Indiana 46312

Our Lady of Perpetual Help School
7128 Arizona Avenue
Hammond, Indiana 46323

St. Stanislaus School
4940 Indianapolis Boulevard
East Chicago, Indiana 46312

Blessed Sacrament
4101 Garfield Street
Gary, Indiana 46408

Holy Family School
3721 Delaware Street
Gary, Indiana 46409

St. Ann School
6001 West 25th Avenue
Gary, Indiana 46406

St. Joseph the Worker School
4460 Delaware Street
Gary, Indiana 46409

St. Mary of the Lake School
6070 Miller Avenue
Gary, Indiana 46403

St. Mary School
525 North Broad Street
Griffith, Indiana 46319

St. Catherine of Siena School
6525 Kentucky Avenue
Hammond, Indiana 46323

Our Lady of Grace School
3025 Highway Avenue
Highland, Indiana 46322

St. Bridget School
107 Main Street
Hobart, Indiana 46342

St. Joseph School
101 C Street
LaPorte, Indiana 46350

SS. Peter & Paul School
5861 Harrison Street
Merrillville, Indiana 46410

Queen of All Saints School
1715 East Barker Avenue
Michigan City, Indiana 46350

St. Stanislaus School
1501 Franklin Street
Michigan City, Indiana 46360

Nativity of Our Savior School
2929 Willowcreek Road
Portage, Indiana 46368

St. Michael School
16 West Wilhelm
Schererville, Indiana 46375

Immaculate Conception School
2022 Schrage Avenue
Whiting, Indiana 46394

St. Adalbert School
2118 Indianapolis Boulevard
Whiting, Indiana 46394

Bishop Noll Institute
1519 Hoffman Street
Hammond, Indiana 46320

Andrean High School
5959 Broadway
Merrillville, Indiana 46410

St. Thomas Aquinas School
404 East Washington Street
Knox, Indiana 46534

Aquinas Elementary School
801 West 73rd Avenue
Merrillville, Indiana 46410

Notre Dame School
1000 Moore Road
Michigan City, Indiana 46360

St. Mary School
312 West Tenth Street
Michigan City, Indiana 46360

St. Thomas More School
8435 Calumet Avenue
Munster, Indiana 46321

St. John Evangelist School
9400 Wicker Avenue
St. John, Indiana 46373

St. Paul School
Chicago & Academy Streets
Valparaiso, Indiana 46383

Sacred Heart School
1723 LaPorte Avenue
Whiting, Indiana 46394

St. John the Baptist School
1844 Lincoln Avenue
Whiting, Indiana 46394

Bishop Noll Junior High
1519 Hoffman Street
Hammond, Indiana 46320

Marquette High School
306 West Tenth Street
Michigan City, Indiana 46360

Supreme Court, U. S.
FILED
APR 8 1977
MICHAEL RODAK, JR., CLERK

No. 76-1219

In the Supreme Court of the United States

OCTOBER TERM, 1976

ANDREW G. GRUTKA, BISHOP OF THE CATHOLIC DIOCESE OF GARY, INDIANA, PETITIONER

v.

ALEX V. BARBOUR,
REGIONAL DIRECTOR OF THE THIRTEENTH REGION,
NATIONAL LABOR RELATIONS BOARD
and
LAY TEACHERS FEDERATION OF THE GARY DIOCESE,
LOCAL 3493

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
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CARL L. TAYLOR,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

RICHARD B. BADER,
CAROL A. DE DEO,
Attorneys,
National Labor Relations Board,
Washington, D.C. 20570.

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. A8- A15) and the district court (Pet. App. A1-A7) are not yet officially reported.

JURISDICTION

The judgment of the court of appeals was entered on February 2, 1977. The petition for a writ of certiorari was filed on March 2, 1977. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a district court may enjoin National Labor Relations Board representation and unfair labor practice proceedings, where the procedures established by the National Labor Relations Act provide an adequate method for review of petitioner's contentions and have not been exhausted.

STATEMENT

In October 1975 the Lay Teachers Federation of Gary Diocese, Local 3493, American Federation of Teachers (the Union), filed a petition with the National Labor Relations Board seeking a representation election among a unit of lay teachers employed by the Catholic Diocese of Gary, Indiana, in its elementary and high schools. After a hearing, the Board's Regional Director, Alex V. Barbour, scheduled a representation election for October 7, 1976 (Pet. App. A8-A9).

In May 1976 the president of the Union filed an unfair labor practice charge with the Board, alleging that petitioner, the Bishop of the Diocese, had discharged him because of his union activities, in violation of Section 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (3), and that petitioner had taken other actions in violation of Section 8(a)(1) of that Act. Regional Director Barbour issued an unfair labor practice complaint on the basis of these charges (Pet. App. A9). An administrative law judge heard evidence concerning this complaint on September 21, 1976 (*ibid.*).

On September 16, 1976, petitioner filed a complaint in the United States District Court for the Northern District of Indiana. Petitioner sought to enjoin the Regional Director from proceeding with the election and the unfair labor practice hearing, and asked that the National Labor

Relations Act be declared unconstitutional as applied to sectarian schools. On October 5, 1976, the district court issued its decision, which permitted the Regional Director to conduct the election but enjoined him from counting the ballots or from taking any other action in the representation and unfair labor practice proceedings until after the United States Court of Appeals for the Seventh Circuit had decided *Catholic Bishop of Chicago* v. *National Labor Relations Board*, No. 76-1600, a case involving constitutional issues identical to those raised by petitioner (Pet. App. A1-A7). The district court did not find that petitioner probably would succeed on the merits.

On February 2, 1977, the court of appeals vacated the district court's injunction and directed it to dismiss the action. The court of appeals held that petitioner should have exhausted his administrative remedies before the Board, and that the constitutional allegations of petitioner's complaint did not warrant an exception to that rule "because the statutory review procedures are fully adequate to protect the plaintiff's constitutional rights" (Pet. App. A14). The court ordered that its mandate issue forthwith. On February 25, 1977, Mr. Justice Stevens denied petitioner's application for a stay.

On February 7, 1977, the district court dismissed the complaint, thereby permitting a tally of the ballots cast in the Board election; the tally disclosed that the Union had failed to receive a majority of the votes. The Union filed objections to the election, which were consolidated with the unfair labor practice complaint. A further hearing on these objections and the unfair labor practice complaint was held on March 14 and 15, 1977. The administrative law judge now is considering his decision.

ARGUMENT

1. Ordinarily district courts do not have jurisdiction to enjoin the Board from conducting representation or unfair

labor practice proceedings, because judicial review of Board action may be had only in the court of appeals following issuance of a final order in an unfair labor practice proceeding. *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 476-479; *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 48-49. Such review affords "an adequate opportunity to secure judicial protection against possible illegal action on the part of the Board." *Myers, supra*, 303 U.S. at 48. "[U]ntil the Board's order has been affirmed by the appropriate * * * Court of Appeals, no penalty accrues for disobeying it," and "all questions of the jurisdiction of the Board and the regularity of its proceedings, all questions of *constitutional right or statutory authority*, are open to examination by the court." *Id.* at 48-49; emphasis added.

The procedures leading to judicial review in the ordinary course do not themselves violate petitioner's rights, and thus there is no reason to permit injunctive action in the district court. At most, petitioner might be subject in the interim to a Board order to bargain with the Union as the representative of the Diocese's lay teachers, to refrain from restraining or coercing employees in the exercise of their right to engage in union activity, and to reinstate with backpay the employee alleged to have been discharged for engaging in union activity. But such an order may never issue, and if it does not issue there will be no need to resolve the First Amendment issue petitioner seeks to present.[1]

Even if the Board should issue an order, petitioner would not be required to comply until it had been enforced by a

[1]The Union lost the election, and a bargaining order could not issue unless the Union's objections are sustained and it is ultimately able to establish that it has the support of a majority of the unit employees. Petitioner has resisted the unfair labor practice charges; petitioner contends that the Diocese engaged only in permissible persuasion, and that no employee has been discharged because of activity on behalf of the Union.

court of appeals; petitioner would have a full opportunity to present to that court his constitutional reasons why the order should not be enforced. The statutory procedure thus affords petitioner an adequate means to obtain judicial review of his contentions.[2]

2. The constitutional basis for petitioner's attack on the Board's authority does not justify bypassing the ordinary course of exhaustion of administrative remedies and review (if that should be necessary) in the court of appeals. As the Court stated in *Myers* v. *Bethlehem Shipbuilding Corp., supra*, 303 U.S. at 50-51, the exhaustion requirement applies to constitutional questions no less than to other types of questions.[3]

It is particularly appropriate that the constitutional questions sought to be raised by petitioner be resolved after, rather than before, the Board proceedings have been completed. As the court of appeals pointed out (Pet. App. A12):

[2]The statutory procedure has been followed in other cases involving First Amendment issues. See *Catholic Bishop of Chicago* v. *National Labor Relations Board, supra; Diocese of Fort Wayne-South Bend* v. *National Labor Relations Board*, petition for review pending, C.A. 7, No. 76-1638; *Cardinal Timothy Manning* v. *National Labor Relations Board*, petition for review pending, C.A. 9, No. 77-1286.

[3]The cases upon which petitioner relies (Pet. 10) for a contrary rule do not involve the National Labor Relations Act. In *Weinberger* v. *Salfi*, 422 U.S. 749, for example, the Court held only that review of certain decisions in welfare cases was authorized by 42 U.S.C. 405(g). Cf. *Califano* v. *Sanders*, No. 75-1443, decided February 23, 1977, slip op. 8-10, which holds that Congress has precluded judicial review of other decisions in welfare cases and observes that courts must honor congressional decisions establishing particular courts and times for judicial review. That is what Congress has done here by designating the court of appeals as the proper forum for review of the Board's decisions. In *Salfi* and in *Mathews* v. *Diaz*, 426 U.S. 67, by contrast, if there was no review in the district courts, there was no judicial review at all.

> In the religious area, the essence of First Amendment inquiry is entanglement, *i.e.*, whether the involvement of the state has improperly established religion or impermissibly interfered with the free exercise of a religious belief. * * * But the nature and scope of the state entanglement attacked can only be measured against a factual record delineating the character of entanglement which assertedly arises from the state intrusion. * * *

In short, without a record indicating what conduct on the part of petitioner is found to violate the Act and what remedial actions, if any, the Board will require petitioner to take, petitioner's allegations of constitutional infringement cannot properly be assessed.[4]

3. *Leedom* v. *Kyne*, 358 U.S. 184, does not assist petitioner. *Kyne* held that district courts may entertain a challenge to Board action that is admittedly contrary to a specific mandatory prohibition in the Act where there is no other

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[4]Petitioner asserts that irreparable harm to a religious institution should be "presumed from the very fact of the first assertion by government over that which lies at the very heart of its religious mission" (Pet. 11). But "[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices." *Reynolds* v. *United States*, 98 U.S. 145, 166. See also *Braunfeld* v. *Brown*, 366 U.S. 599, 603-604. The mere assertion of jurisdiction by the Board in no way infringes petitioner's freedom to hold any religious belief, and whether the Board will restrict petitioner's conduct cannot be determined until the completion of the Board proceedings.

Petitioner's allegations (Pet. 10-11) regarding the Board's lack of specialized competence in the areas of constitutional law and religion do not justify petitioner's attempt to circumvent the exhaustion requirement. The assertion of constitutional claims "constitutes a strong reason for *not* allowing" anticipatory judicial intervention, since the administrative determination may eliminate the necessity of deciding the constitutional question. *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U.S. 752, 772; emphasis added.

adequate method of obtaining judicial review of that action. As the court of appeals stated, "[u]nlike *Kyne*, this case presents no patent disregard by the Board of the bounds of its statutory jurisdiction" (Pet. App. A11). Petitioner's First Amendment claims raise factual issues regarding the extent of church-state "entanglement" which may or may not result from the Board's assertion of jurisdiction. Moreover, the absence of power in the district court does not preclude petitioner from litigating his constitutional claims; it means only that petitioner must do so in the statutorily prescribed manner.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

CARL L. TAYLOR,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

RICHARD B. BADER,
CAROL A. DE DEO,
Attorneys,
National Labor Relations Board.

APRIL 1977.

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[5]*McCulloch* v. *Sociedad Nacional*, 372 U.S. 10, is a case in which judicial intervention was justified only because actions taken by the Board "created international problems for our Government." *Id.* at 16-17. No such extraordinary circumstances are present here.

MOTION FILED
APR 15 1977

IN THE

Supreme Court of the United States

October Term, 1976.

No. 76-1219.

ANDREW G. GRUTKA, as Bishop of the Catholic Diocese of Gary, Indiana,

Petitioner,

v.

ALEX V. BARBOUR, Regional Director of the Thirteenth Region, National Labor Relations Board,

and

LAY TEACHERS FEDERATION OF THE GARY DIOCESE, LOCAL 3493,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF THE AMERICAN BAPTIST CHURCHES OF THE USA AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

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INDEX.

	Page
MOTION FOR LEAVE TO FILE BRIEF *Amicus Curiae*	ii
CERTIFICATE OF SERVICE	iv
TABLE OF AUTHORITIES	v
INTEREST OF THE *Amicus Curiae*	2
QUESTION TO WHICH THIS BRIEF IS ADDRESSED	2
STATEMENT OF THE CASE	3
ARGUMENT	5
CONCLUSION	15
APPENDIX:	
Statements of the American Baptist Churches in the USA on the Principle of Separation of Church and State .	16

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE.

The American Baptist Churches in the USA hereby respectfully moves for leave to file the accompanying brief *amicus curiae* in support of petitioner as provided in Rule 42 of the Rules of the Supreme Court of the United States. The petitioner has consented. One of the respondents, Alex V. Barbour, Regional Director of the Thirteenth Region, National Labor Relations Board, has consented by way of a letter dated March 29, 1977 from Wade H. McCree, Jr., the Solicitor General of the United States. In a letter dated March 29, 1977, Charles Orlove, Esquire, Counsel for respondent Lay Teachers Federation of the Gary Diocese, Local 3493, refused to consent stating as follows:

> "I find it necessary to refuse consent to your filing a brief of an *amicus curiae* by the American Baptist Churches in the subject case because this matter involves only a procedural question—whether the U. S. District Courts have jurisdiction to enjoin proceedings by the National Labor Relations Board with respect to private schools operated by a religious entity."

The American Baptist Churches in the USA, with national offices in Valley Forge, Pennsylvania, is one of the major protestant denominations in the United States.

The American Baptist Churches in the USA has a mandate from its General Board to speak whenever Baptist principles are involved, or are jeopardized through governmental action.

The issue posed in this case is basic to the Baptist principle of religious liberty.

This *amicus curiae* brief is an attempt to present to this court additional information based on Baptist ex-

perience in church-state matters. For numerous years prior to the enactment of the First Amendment to the Constitution of the United States, American Baptists expressed orally and in writing their views on the principle of religious liberty. We continue that practice today.

The attached brief is submitted in the hope that it will assist this Court in its deliberations.

For the foregoing reasons, the *amicus curiae* respectfully prays that this motion be granted.

Respectfully submitted,

EARL W. TRENT, JR.,
Attorney for the American Baptist Churches in the USA as Amicus Curiae.

CERTIFICATE OF SERVICE.

A copy of the foregoing Motion, together with brief *amicus curiae* attached, was served by mailing a copy to the petitioner's attorney, William B. Ball, 127 State Street, P. O. Box 1108, Harrisburg, Pa. 17108; and a copy of the foregoing Motion, together with brief *amicus curiae* attached, was served on respondent, Alex V. Barbour by mailing a copy to Wade H. McCree, Jr., Office of the Solicitor General, Washington, D. C. 20530, and to William Wachter, Assistant General Counsel, Special Litigation—National Labor Relations Board, 1717 Pennsylvania Avenue, N.W., Washington, D. C. 20570; and a copy of the foregoing Motion together with brief *amicus curiae* attached, was served on respondent, Lay Teachers Federation of the Gary Diocese, Local 3493, by mailing a copy to Charles Orlove, 201 North Wells Street, Suite 1900, Chicago, Illinois 60606, on this 15th day of April, 1977.

EARL W. TRENT, JR.,
Attorney for Amicus Curiae American Baptist Churches in the USA.

TABLE OF AUTHORITIES.

Cases:	Page
Califano v. Sanders, 45 U. S. L. W. 4209 (February 22, 1977)	13
Catholic Bishop of Chicago, 220 NLRB 359 (1975)	11
Caulfield v. Hirsh (E. D. Pa., Feb. 17, 1977, C. A. No. 76-276)	12
Edward G. Budd Mfg. Co. v. NLRB, 138 F. 2d 86 (3d Cir. 1943) cert. denied, 321 U. S. 778 (1944)	8
Everson v. Board of Education, 330 U. S. 1 (1947)	6
Fibreboard Paper Products Corp. v. NLRB, 379 U. S. 203 (1964)	9
Grutka v. Barbour, — F. 2d — (7th Cir., Feb. 2, 1977, Nos. 76-2129 and 76-2130)	4, 12
Johnson v. Robison, 415 U. S. 361 (1974)	13
Leedom v. Kyne, 358 U. S. 184 (1958)	10
Lemon v. Kurtzman, 403 U. S. 602 (1971)	7, 8, 9
Mathews v. Eldridge, 424 U. S. 319 (1976)	13
McColloch v. Sociedad Nacional de Marineros de Honduras, 372 U. S. 10 (1963)	11
NLRB v. Reed & Prince Mfg. Co., 205 F. 2d 131 (1st Cir.) cert. denied, 346 U. S. 887 (1953)	9
Sherbert v. Verner, 374 U. S. 398 (1963)	7
Unelco Electronics Corp., 199 NLRB 1254 (1972)	8
Walz v. Tax Commission, 397 U. S. 664 (1970)	7
Weinberger v. Salfi, 422 U. S. 749 (1975)	13
Wisconsin v. Yoder, 406 U. S. 205 (1972)	7
United States Constitution:	
Amendment 1	*passim*
Statute:	
National Labor Relations Act, 29 U. S. C. § 141 et seq.	8, 9, 10
Miscellaneous:	
Baptists and the American Experience, Edited by James E. Wood, Jr. (Judson Press 1976)	6
Revised NLRB Standards for Asserting Jurisdiction, 42 LRRM 96 (1958)	8

IN THE

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ANDREW G. GRUTKA, as Bishop of the Catholic Diocese of Gary, Indiana,

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and

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF THE AMERICAN BAPTIST CHURCHES OF THE USA AS AMICUS CURIAE.

The American Baptist Churches of the USA respectfully submits this brief as *Amicus Curiae* in support of the petition, filed by Andrew G. Grutka as Bishop of the Catholic Diocese of Gary, Indiana, praying that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above case on February 2, 1977.

INTEREST OF THE AMICUS CURIAE.

The American Baptist Churches in the USA is composed of four principal national agencies, and thirty-seven regional, city and state organizations in the United States, who represent more than six thousand congregations on matters pertaining to their relationship with the government of the United States of America, its agencies and departments as they affect our churches, administrative units and integrated and affiliated agencies engaged in Baptist mission activities.

Among Baptists religious liberty is a fundamental and sacred principle. Religious liberty is also a fundamental legal right protected by the First and Fourteenth Amendments to the Constitution of the United States. It is the opinion of the American Baptist Churches in the USA that the principle of religious liberty is jeopardized by the decision of the United States Court of Appeals for the Seventh Circuit dated February 2, 1977, which is on appeal in this case.

QUESTION TO WHICH THIS BRIEF IS ADDRESSED.

Does the First Amendment Religion Clauses guarantee churches a right to prompt access to courts of law to seek restraint against the assertion of governmental power over their religious mission?

STATEMENT OF THE CASE.

Bishop Andrew G. Grutka, the Petitioner,[1] is governing head of the Roman Catholic Diocese of Gary, Indiana, and is charged by the law of his Church with ultimate responsibility, both spiritual and temporal, for the Catholic schools of the diocese. On September 16, 1976, the Bishop filed a complaint against the National Labor Relations Board,[2] seeking a preliminary and permanent injunction against application of the National Labor Relations Act to those schools and thus to restrain NLRB from further asserting jurisdiction over, or taking any action with respect to, Catholic schools, or teachers therein, of the Diocese of Gary and from holding an election which NLRB had ordered for October 7, 1976, for the lay teachers in those Catholic schools. The complaint also sought to enjoin NLRB's proceeding further under the Act in prosecuting an unfair labor practice charge against the Bishop. Finally, the complaint sought a declaratory judgment that the National Labor Relations Act is unconstitutional as applied to the said Catholic schools which are an integral part of the religious mission of the Catholic Church.

On September 24, 1976, the Bishop filed a Motion for Temporary Restraining Order to enjoin application of the Act to the schools on the ground of immediate and irreparable injury caused to him thereby through violation of his rights under the Religion Clauses of the First Amendment and under the Fifth and Ninth Amendments to the Constitution of the United States. To this Motion was appended the affidavit of F. Raymond Fowerbaugh, which affidavit included verification of the allegations of the complaint as well as specification of facts believed to constitute irreparable harm.

On September 30, 1976, NLRB filed a Motion to Dismiss for lack of subject matter jurisdiction or alternatively

1. Hereinafter also referred to as "the Bishop."
2. Hereinafter referred to as "NLRB", or "the Labor Board."

for summary judgment. On October 5, 1976, the District Court, after hearing, issued a preliminary injunction enjoining all further action [3] by NLRB in exercising its jurisdiction. The Court held the Bishop's challenge not frivolous but as involving "fundamental Constitutional issues" of great magnitude and of far-reaching importance.

Thereafter NLRB and the Respondent Union appealed to the United States Court of Appeals for the Seventh Circuit. Oral argument took place on January 21, 1977, and on February 2, 1977, the Court of Appeals vacated the preliminary injunction on the ground that the District Court lacked subject matter jurisdiction. The principal reasons stated by the Court of Appeals for its decision were (a) that "developing a factual record in labor disputes is a task peculiarly within the competence of the Board", and (b) that "the statutory review procedures are fully adequate to protect the plaintiff's constitutional rights." [4]

On February 11, 1977, pursuant to the mandate of the Court of Appeals, the ballots which had been cast in the October 7, 1976, election were counted, the majority of the teachers rejecting the Union as their bargaining representative. Objections to the Election were filed by the Union with NLRB February 15, 1977, thus extending the representation proceedings. Proceedings in the unfair labor practice charge case have been scheduled to resume March 7, 1977. In the face of the resumption of the exercise of NLRB jurisdiction over his schools, the Petitioner, on February 22, 1977, applied to Mr. Justice Stevens for a stay in enforcement of the judgment and mandate of the Court of Appeals pending the filing of a Petition for Certiorari and disposition of that Petition by this Court.

3. The District Court permitted the scheduled election to take place, the ballots, however, to be impounded uncounted.

4. *Grutka v. Barbour,* – F. 2d – (7th Cir., Feb. 2, 1977, Nos. 76-2129 and 76-2130).

ARGUMENT.

The Supreme Court should grant certiorari because the question presented in this Petition is of first impression nationally and affects the rights of all churches and associations of churches in this country. Immediate access to judicial review in all substantive matters raising First Amendment concerns of churches and religious organizations is a singularly important issue to Baptists today. We are alarmed at the degree to which government administrative agencies have involved themselves in the internal affairs of churches, most of which is occurring without the slightest legislative authority. Although the religious community can effectively resist legislative attempts to exercise authority over the religious mission of churches, we are without recourse when an administrative agency unilaterally usurps such authority. We feel that the integrity of both church mission activity and government's administrative functions are preserved where conflicts are accorded early judicial review.

The constant threat of government intrusion free of immediate judicial review into the affairs of churches has a chilling effect on volunteers who plan and implement activities in pursuit of their religious mission. Many religious organizations must now function in an atmosphere of uncertainty with respect to their rights while attempting to pursue fund raising and program activities.

We have learned through experience that immediate judicial relief against encroachments of government into church affairs is essential to avoid the consequences of a panoply of other governmental regulatory agency actions. These kinds of agency actions amount to an indirect tax on churches who must face the burdens and costs set by the government while undergoing administrative proceedings. We are too often frustrated by the diversion of our limited

resources and time from primary mission responsibilities to compliance with governmental demands of agencies who lack competence in the area of First Amendment concerns of churches. Baptists believe that the church is irreparably harmed and religious liberty is abridged when government without prior judicial review can assert control over its religious mission through investigations, interrogations, and the use of government's full weaponry of summonses, subpoenas and hearings to accomplish the ends of administrative agencies.

Religious liberty is so fundamental to Baptist beliefs that the protection of these First Amendment rights is preeminent among matters of great public concern to us. The Baptist sect was in large part formed in reaction to the oppressive conditions of a state church. Early Baptist experiences have taught us the wisdom of keeping the functions of church and state separate. This experience inspired Baptist to make a distinct and notable contribution to the enactment of the First Amendment to the Constitution, whose religion clauses have been described as America's greatest contribution to world civilization.[5]

The "Wall of Separation" a metaphor used by Roger Williams, an early Baptist and founder of Rhode Island Colony, and a century and a half later by Thomas Jefferson in expressing his views on the desired relationship between church and state (See *Everson v. Board of Education*, 330 U. S. 1, 18 (1947)), still epitomizes Baptist views on this subject today. Baptist have historically been vigilant in efforts to keep the wall impregnable.

We feel there should be no limitation on access to a district court by churches seeking a review of governmental action which jeopardizes the principle of separation of church and state. Prompt access to judicial review is

5. Baptists and the American Experience, edited by James E. Wood, Jr. p. 20 (1976).

essential if we are to avoid the kinds of "confrontations and conflicts" between government and churches warned of in *Walz v. Tax Commission*, 397 U. S. 664 at 674 (1970).

A district court can immediately determine at minimum expense to both the church and the government whether there exists a "compelling state interest" justifying a limit to religious liberty. This court in *Sherbert v. Verner*, 374 U. S. 378 (1963) stated:

> "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area,—'[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.'" *Id.* at 406.

The conduct complained of must have ". . . posed some substantial threat to public safety, peace or order." *Id.* at 403. This Court further stated in *Wisconsin v. Yoder*, 406 U. S. 205 (1972) government must claim either that it does not deny the free exercise of religion, or that there is "a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause." *Id.* at 124.

It is obvious that the government cannot show an interest of sufficient magnitude to override the Bishop's rights to ultimate authority in the Catholic schools in his diocese. By asserting jurisdiction over the parochial school system operated by the Catholic Church, the NLRB has involved the federal government in the affairs of that Church in violation of both the Establishment Clause and the Free Exercise Clause of the First Amendment. The Establishment Clause forbids "excessive government entanglement with religion." *Lemon v. Kurtzman*, 403 U. S. 602, 613 (1971); *Walz v. Tax Commission, supra* at 674.

The importance of preserving the separation of church and state is such that government action has been scrutinized to guard against even the "potential" for such entanglement. *Lemon v. Kurtzman, supra* at 618. Excessive government entanglement with the religious affairs of the Catholic schools is the inevitable result of the Board's assertion of jurisdiction over those schools.

A brief survey of the role of the NLRB in the supervision of labor-management relations reveals the extent of the inevitable entanglement. Initially, to determine whether the Board's jurisdictional standards are met, the employer must be questioned concerning the dollar volumes of its business. See generally, *Revised NLRB Standards for Asserting Jurisdiction*, 42 LRRM 96 (1958). In the case of a church, this would presumably involve such matters as the amounts received in the collection plate. The Board may also be called upon to determine appropriate bargaining units, National Labor Relations Act § 9(b); 29 U. S. C. § 159(b). To do so, the Board must investigate such matters as the duties and skills of the employees involved, and the organizational structure of the employer. *Unelco Electronics Corp.*, 199 N. L. R. B. 1254 (1972). During the course of a union organizing campaign, the NLRB may be called upon to determine whether church leaders have committed unfair labor practices such as discharging teachers for supporting the union. National Labor Relations Act § 8(a)(3); 29 U. S. C. § 158(a)(3). In the parochial school context, the Board might be required to determine whether a nun or priest discharged an employee for engaging in union activity or for some neutral "business" reason such as failure to teach certain religious principles. See generally, *Edward G. Budd Mfg. Co. v. NLRB*, 138 F. 2d 86 (3d Cir. 1943) cert. denied, 321 U. S. 778 (1944). Should a union be certified as bargaining agent for the employees of a religious organization, the NLRB would ensure that the church bargained "in good faith." National Labor Relations Act §§ 8(a)(5), 8(d); 29 U. S. C. §§ 158(a)(5), 158(d). In addition to judging the subjective good faith of the religious leaders who are bargaining with the union, *NLRB v. Reed & Prince Mfg. Co.*, 205 F. 2d 131 (1st Cir.) cert. denied, 346 U. S. 887 (1953), the Board would decide what subjects are included within the scope of the duty to bargain. The church would be required to bargain concerning "terms and conditions of employment." See generally, *Fibreboard Paper Products Corp. v. NLRB*, 379 U. S. 203 (1964). Thus, at the insistence of the union, the Board could be called upon to decide whether, for example, the curriculum of a parochial school is a "mandatory subject of bargaining."[6]

As this brief survey demonstrates, the NLRB, in performing its proper role, will be called upon to investigate the organization of the diocese and the decisions of church leaders. In doing so, the Board will touch upon many matters of religious concern. "This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids." *Lemon v. Kurtzman* at 620.

The NLRB also interferes with the "free exercise" of religion in the Catholic schools when it provides support for a union organizing teachers. A union which is recognized as a result of an NLRB election will likely demand changes in the decision-making process in such matters as the discharge of teachers. Decision over such matters as to whether a teacher may be discharged for his religious beliefs may become a subject for grievance and arbitration rather than unilateral decision. The church is, of course,

6. As the Court noted in *Lemon v. Kurtzman, supra*, the teaching of secular subjects often becomes intertwined with the teaching of religion. 403 U. S. at 618-619.

free to surrender such decision-making power if it chooses to do so. Constitutional issues are raised only because the impetus for the surrender is provided by a government agency.

The Court has recognized an exception to the usual review requirements in two important cases. In *Leedom v. Kyne,* 358 U. S. 184 (1958), the Court held that a Federal District Court has jurisdiction to issue an injunction to restrain the Board from certifying a bargaining unit containing professional and non-professional employees, contrary to § 9(b)(1) of the National Labor Relations Act. 29 U. S. C. § 159(b)(1). The Court stated that the Board "deprived the professional employees of a 'right' assured to them by Congress. Surely, in these circumstances, a Federal District Court has jurisdiction of an original suit to prevent deprivation of a right so given." 358 U. S. at 189. If the district courts have jurisdiction to prevent the deprivation of a right granted by Congress, then it follows that the district courts must have jurisdiction to prevent the deprivation of a right guaranteed by the Constitution of the United States.

Leedom v. Kyne contains, of course, language designed to narrowly limit the scope of its holding. Application of the rule of *Kyne* to a case where the Board asserts jurisdiction contrary to the Constitution would not result in any enlargement of that rule. The Court stated initially in *Kyne* that the question presented concerned, not the jurisdiction of the district courts to vacate a determination of the Board involving an error of law, but only one "made in excess of its powers." 358 U. S. at 185. Surely a decision of the Board to exercise power denied it by the Constitution is "made in excess of its powers."

The Court in *Kyne* also limited its holding by pointing out that the Board had acted "contrary to a specific prohibition in the Act." 358 U. S. at 188. Here we are not

concerned with any specific prohibition contained in the Labor Management Relations Act (the Act). Here we are concerned with an exercise of power by the Board beyond any contemplated by the framers of the Act.[7]

The Board has sharply departed from this limitation to "purely commercial activities" by its current practice of asserting jurisdiction over schools which are not "completely religious" in nature. *Catholic Bishop of Chicago,* 220 NLRB 359 (1975). If a court may enjoin the Board from asserting powers specifically forbidden by Congress, it must also have jurisdiction to enjoin the Board from exercising power in a manner so unforeseen that Congress did not feel it necessary to write a specific prohibition into the law.[8]

The Court has on one occasion held that a district court may enjoin the Board from exercising powers not granted by Congress even in the absence of any specific provision forbidding that exercise of power. *McColloch v. Sociedad Nacional de Marineros de Honduras,* 372 U. S. 10 (1963). There, the Court held that a district court could enjoin the NLRB from asserting jurisdiction over ships owned by foreign subsidiaries of a United States Corporation which fly the flag of a foreign nation. No

7. When the National Labor Relations Act was amended by the Taft-Hartley Act in 1947, the House proposed an amendment to the definition of an employer which would have excluded all religious organizations. 1947 H. R. 3020. This amendment was eliminated by the Conference Committee because "only in exceptional circumstances and in connection with *purely commercial* activities of such organizations have any of the activities of such organizations or of their employees been considered as affecting commerce so as to bring them within the scope of the National Labor Relations Act." Committee of Conference, House Report No. 510, June 3, 1947; 1947 U. S. Code Congressional Service 1135, 1137.

8. This reading of the legislative history is strengthened by the well-known principle of statutory construction that the Court will construe a statute to avoid constitutional issues if such a reading of the statute is reasonable.

specific provisions of the Act were offended. The Court nevertheless stated that it was not extending the *Leedom v. Kyne* exception to the ordinary review procedures. Rather, the Court stated that an injunction could issue because of "the presence of public questions particularly high in the scale of our national interest . . ." 372 U. S. at 17. In that case, the important issues involved foreign affairs. We submit that the principle of separation of church and state enshrined in the First Amendment is of an importance equal to the relations of the United States to the nation of Honduras.

Faced with these arguments, we think the Court of Appeals erred by holding that the diocese should be required to exhaust the NLRB proceedings in order to create a full factual record against which the "entanglement" issue could be judged. *Grutka v. Barbour*, – F. 2d – (7th Cir., Feb. 2, 1977, Nos. 76-2129 and 76-2130). The obvious fallacy of this argument is that the question of whether excessive entanglement will result from the NLRB's assertion of jurisdiction is not a labor question. The issue is whether excessive entanglement between the Board and the Catholic Church will result from the Board's contacts with the Church. The Board has no special experience or competence to make such a determination. Indeed, one may question the ability of the Board to neutrally evaluate its own entanglement with the church. As the court stated in *Caulfield v. Hirsch* (E. D. Pa., Feb. 17, 1977, C. A. No. 76-276), "This is not a labor case but a First Amendment case."

This Court has recognized in other contexts that a challenge to the constitutionality of the actions of an administrative agency is fundamentally different from a challenge based on factual or statutory grounds. Thus, this Court held that 38 U. S. C. § 211(a), which bars judicial review of decisions of the Administrator of Veterans' Affairs, does not apply to cases where his decision is challenged on constitutional grounds. *Johnson v. Robison*, 415 U. S. 361 (1974). This Court interpreted the statute so as to avoid the constitutional problems which would be raised by a statute which foreclosed judicial review of the constitutionality of government action. In the instant case, Petitioners will ultimately be able to obtain judicial review by committing an unfair labor practice. Requiring Petitioners to do so, however, would result in unconstitutional entanglement of the church with the NLRB during the lengthy administrative proceedings involved.

Similarly, this Court has also held that § 205(g) [9] of the Social Security Act does not foreclose judicial determination of constitutional challenges to decisions of the Secretary of HEW. *Weinberger v. Salfi*, 422 U. S. 749 (1975); *Mathews v. Eldridge*, 424 U. S. 319 (1976). In explaining those decisions, this Court stated:

> Constitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions. . . . [T]hose cases merely adhered to the well-established principle that when constitutional questions are in issue, the availability of judicial review is presumed, and we will not read a statutory scheme to take the "extraordinary" step of foreclosing jurisdiction unless Congress' intent to do so is manifested by "clear and convincing" evidence. [citations omitted]. *Califano v. Sanders*, 45 U. S. L. W. 4209, 4211 (February 23, 1977).

There is no reason to believe that NLRB hearing procedures are any better suited to the resolution of consti-

9. 42 U. S. C. § 405(g).

tutional issues than HEW hearing procedures. Therefore, the same presumption of the "availability of judicial review" should be operative in the instant case.

There is one final reason why a religious organization should not be placed in the position of having to commit an unfair labor practice in order to challenge the Board's jurisdiction. Most religious organizations have played an important role in fostering respect for our government and its democratic institutions. It would be anomalous at best for this Court to place such institutions in the position of having to disobey an order of an agency of the federal government in order to vindicate a constitutional right when the alternative of following the orderly process for seeking an injunction is readily available.

CONCLUSION.

We conclude by urging this Court to grant certiorari because of the importance of the issue raised to all churches. The exercise of jurisdiction by the NLRB over the Catholic schools will result in excessive entanglement of the Board with the church. This entanglement is the inevitable result of the Board's supervision of the labor relations practices in these religious schools. In order to preserve the right of a church to pursue its religious mission free of government interference, some effective judicial relief must be made available to a church before the NLRB or any similar governmental administrative agency devoid of expertise in religious matters becomes involved in church affairs. We submit that a district court injunction is the only such effective judicial relief available and acceptable to churches.

Respectfully submitted,

EARL W. TRENT, JR.,
House Counsel,
National Ministries,
American Baptist Churches,
Attorney for Amicus Curiae.

APPENDIX.

RELIGIOUS LIBERTY

WHEREAS, We as American Baptists have seen anew the significance and necessity of the principles of religious freedom and the separation of Church and State which our forefathers first proclaimed and practiced in this land; and

WHEREAS, We believe that the time has now come, at this mid-century, to restate and to reaffirm those basic principles for both the welfare of our nation and for the freedom of the world; therefore, be it

Resolved, That we as American Baptists reaffirm at this mid-century our support of the following principles: (a) religious liberty for all people everywhere; (b) the right of every person to hold whatsoever religious beliefs his conscience may dictate; (c) freedom of the press, freedom of speech, freedom of assembly; and (d) the absolute separation of Church and State. Furthermore, be it

Resolved, That in fulfilling our own principles of freedom we actively support such human rights and fundamental freedoms as are expressed in the Universal Declaration of Human Rights of the United Nations.

Adopted by the American Baptist Churches—May 1950

SEPARATION OF CHURCH AND STATE

WHEREAS, there are increasing encroachments upon the time-honored American principle of the separation of church and state, and

WHEREAS, freedom of religion is not recognized in countries where Protestantism is not strong; therefore, be it

Resolved, that we go on record as deploring all religious oppression anywhere, whether by state or church, and that we urge our Baptist people to be alert and vigorous in preserving and promoting religious freedom and the separation of church and state.

Adopted by the American Baptist Churches—1951

RELATIONS BETWEEN CHURCH AND STATE

Recognizing that Baptists have historically resisted any involvement of the process of the state over the affairs of the church, and of their equal concern that no church or churches shall exercise control over public institutions which are designed to serve the needs of the citizens generally, be it resolved:

a. That American Baptist churches and related institutions, in cooperation with the Division of Christian Social Concern, review their present policies and practices with reference to the principles of freedom and responsible participation in the life of the nation.

b. That American Baptists reaffirm their traditional commitment to a local and state controlled system of free and equal elementary and secondary public education for all citizens irrespective of race or religion, and that we oppose any effort to undermine its effectiveness or limit its benefits.

c. We recognize the right of churches and other organizations and groups to establish private schools in the interest of spiritual, moral or other objectives which they believe cannot be accomplished satisfactorily within the framework of the public school system. We insist, however, that the support of such private schools is solely the responsibility of their respective constituencies and is in no

way a public obligation. We urge all Baptists, therefore, to resist all attempts to obtain public funds for the support of private elementary and secondary schools, whether by direct appropriation, through the provision of auxiliary services and benefits, or granting of local tax exemptions or credits.

Adopted by the American Baptist Churches—1963

MOTION FILED

APR 19 1977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1219

ANDREW G. GRUTKA,
Petitioner,
v.
ALEX V. BARBOUR, Regional Director of the Thirteenth Region, National Labor Relations Board,
and
LAY TEACHERS FEDERATION OF THE GARY DIOCESE, LOCAL 3493,
Respondents.

MOTION OF GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS AS AMICUS CURIAE IN SUPPORT OF PETITION OF CERTIORARI

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MOTION OF GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The General Conference of Seventh-day Adventists respectfully moves this Court for leave to File the accompanying Brief in this case as Amicus Curiae. The consent of the Attorney for the Petitioner herein has been obtained, and the office of the Solicitor General has also indicated its willingness to consent to the filing of such a brief. The Attorney for the Respondent, Lay Teachers Federation of the Gary Diocese, Local 3493, has refused to consent to the filing of a Brief by the General Conference of Seventh-day Adventists as Amicus Curiae.

The Applicant, General Conference of Seventh-day Adventist, has a significant interest in this case for the reason that the issues raised involve the application of the National Labor Relations Act to Church operated schools.

The Seventh-day Adventist Church operates the second largest Protestant parochial school system in the United States.

The issues involved in this case are therefore of vital interest to the Seventh-day Adventist Church and its members. Any decision in this area of the law has a direct impact on the operation of the Church's schools and other institutions.

The Seventh-day Adventist Church has long been active in the area of religious liberty and the preservation of the separation of Church and State.

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BRIEF OF GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS AS AMICUS CURIAE IN SUPPORT OF PETITION OF CERTIORARI

INTEREST OF THE AMICUS CURIAE

The Seventh-day Adventist Church is a recognized world-wide religious denomination. It became an original church body in 1863 and today it has a total membership of slightly less than 2½ million people. Within the fifty states and the District of Columbia are more than 3,000 local Seventh-day Adventist congregations having a membership of approximately 500,000.

The Seventh-day Adventist Church maintains over 3500 elementary schools, 396 secondary level schools, 76

colleges and universities and 33 schools of nursing in its world-wide educational system.

In the United States alone the Seventh-day Adventist Church operates the second largest Protestant parochial school system. This includes almost 1000 elementary schools, more than 81 secondary level institutions, and 11 colleges and universities.

The Church in the United States employs more than 3000 elementary teachers and approximately 4000 high school and college level teachers and instructors.

The elementary schools operated by the Church in this country have an enrollment in excess of 54,000 students. There are approximately 24,000 children now attending the Church's secondary schools. The enrollment in the colleges and universities operated by the Church in this country approaches 18,000 students.

It is the historical teaching of the Seventh-day Adventist Church that its members should not join or financially support labor unions and similar organizations.

The teachings of the Church relative to involvement in unions has prompted the discharge from employment of Seventh-day Adventist who, because of religious conviction, were unable to join or financially support a labor union. See for example *Cooper* v. *General Dynamics*, 553 F. 2d 163 (5th Cir. 1976).

The Seventh-day Adventist Church views its schools as an integral part of the Church. A large portion of the budget of the Church is committed to the maintenance and operation of its world-wide educational system.

The question as to whether the Church must be denied access to the courts until after an administrative agency has completed its process is therefore of vital concern to the Church.

Equally important to the Church is the question of whether the First Amendment is a barrier to NLRB jurisdiction over schools and other institutions which the Church operates as an integral part of its mission.

The Seventh-day Adventist Church has long been active in the defense of religious freedom. It has championed the free exercise of religion not only for its own members but also on behalf of those of other religious persuasions who have sought the protection of their Constitutional rights under the Religion Clauses of the First Amendment.

The important constitutional issues raised in this case; the ultimate impact of any holding in regard thereto; the concern of the Church for the full protection of its right to operate its schools free of excessive government entanglement; and the importance of preserving the free exercise of religion has prompted the filing of this brief.

ARGUMENT

THE PETITION FOR A WRIT OF CERTIORARI HERE INVOLVES A QUESTION OF EXCEPTIONAL IMPORTANCE DIRECTLY AFFECTING THE RIGHTS OF CHURCHES AND THEIR MEMBERS TO DIRECT JUDICIAL RELIEF WHERE FIRST AMENDMENT RIGHTS ARE CLAIMED TO BE VIOLATED

The issues raised by the Petition pertain directly to the rights of churches and their members to have direct access to the federal courts where First Amendment rights are claimed to have been violated.

The Religion Clauses of the First Amendment provide:

> "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; . . . ."

The First Amendment has therefore erected a wall between church and state. "That wall must be kept high and impregnable." *Everson* v. *Board of Education,* 330 U.S. 1, 18 (1946).

This Court has declared that it would "not tolerate either governmentally established religion or governmental interference with religion." *Waltz* v. *Tax Commissioner of the City of New York,* 397 U.S. 664, 669 (1970).

In *Waltz* this Court stressed the importance of chartering a judicial course "that preserved the autonomy and freedom of religious bodies while avoiding any semblance of established religion." 397 U.S. at 672.

The doctrinal element found in *Waltz* is the emphasis on what the Court's opinion describes as "entanglements" between church and state and the corresponding necessity of clearly examining governmental actions to see if the government thereby becomes excessively involved in the affairs of the church.

Underlying the twin clauses of the First Amendment is the idea that the state and the churches have separate functions to perform and that the state may neither intrude into the affairs of the churches nor actively intervene in religious matters. See *The Waltz Decision: More On The Religious Clauses Of The First Amendment,* 69 Mich. L. Rev. 179, 201.

In the case now before this Court the petitioner filed a complaint against the National Labor Relations Board seeking a preliminary and permanent injunction against the application of the National Labor Relations Act to the schools operated by the Roman Catholic Diocese of Gary, Indiana.

The petitioner's argument is based upon the contention that the Wagner Act as amended by the Taft Hartly Act of 1947, 29 U.S.C. § 141 et seq. cannot constitutionally be protracted to apply to labor relations between the Catholic Diocese of Gary and lay teachers employed in their parochial schools, as to do so would violate rights guaranteed by the First Amendment of the United States Constitution.

It is the position of the NLRB that it has exclusive jurisdiction until the exhaustion of administrative remedies (App. A 2)

Freedoms of the First Amendment stand in a preferred position. *Saia* v. *New York,* 334 U.S. 558 (1948). Of all the constitutional guarantees, the protection of religious liberty has been the most exalted. See P. Kauper, Religion and the Constitution, 19 (1964) and the cases cited therein.

It is submitted that the injection of the NLRB into the internal affairs of the parochial schools of the Diocese of Gary constitutes an impermissible invasion into an area where the Church must remain autonomous.

This Court, in *Waltz,* has recognized the fact that a religious body maintains its parochial schools for the primary purpose of assuring future adherence to that particular faith. 397 U.S. at 671.

The effect of NLRB presence in this case resulted in the interposition of an arm of the state between the Church and those working to carry out the mission of the Church. Such action presents the spector of state interference with the free exercise of religion.

Likewise the introduction of the NLRB into the internal affairs of the parochial schools operated by petitioner constitutes state action which may well have the effect of inhibiting religion contrary to the proscriptions of the Establishment Clause. *Committee for Public Education* v. *Nyquist,* 413 U.S. 756, 773 (1973).

The District Court was rightly concerned about "the alleged harmful effect which awaiting the exhaustion of internal NLRB appellate proceedings may have on the plaintiff's right to provide religious instruction"; and "the injection of the NLRB into the internal structure of the parochial schools" which "necessarily accentuates any dissention among the teachers, both lay and religious." (App. A 6)

The application of the doctrine of administrative exhaustion , as espoused in the decision of the Court of Appeals, to the Seventh-day Adventist Church would raise serious church-state problems. Teachers employed by the Seventh-day Adventist Church are generally licensed or credentialed by the Church as missionaries in recognition of their role as partners with the clergy in matters of a spiritual nature.

The position of the NLRB carried to its logical conclusion would permit that agency to assert jurisdiction over the entire ministry of the Church. The Church would, however, be deprived of access to the federal courts throughout the full course of the NLRB investi-

gations and proceedings. Such a situation would be intolerable to the Church and a direct invasion into matters spiritual.

Within the framework of the Seventh-day Adventist Church there can be no separation of the mission of the Church and the operation of its schools. This can readily be noted from the statement voted by the delegates to the Vienna, Austria, Quinquennial General Conference Session of the Seventh-day Adventist Church on July 18, 1975. It said:

> . . . Seventh-day Adventist denominationally operated institutions such as schools, hospitals, and publishing houses are the church fulfilling its teaching ministry, its health ministry, its literature ministry; therefore they are indispensable to, and indivisible from, the church's total ministry in carrying the gospel to all the world . . .

The Court, in ruling on the Motion to Dismiss filed by the NLRB faced allegations clearly setting forth a fundamental constitutional issue. In considering the Defendant's motion the allegations contained in the complaint had to be accepted by the Court as true and construed favorably to the pleader. *Scheuer* v. *Rhodes,* 416 U.S. 232 (1974).

The thrust of Petitioner's claims are directed at violations of Constitutional principles as opposed to labor law policy, thus the District Court had jurisdiction over the issues raised. *Leedom* v. *Kyne,* 358 U.S. 184 (1958); *McCulloch* v. *Sociedad National,* 372 U.S. 10 (1973).

As is true of other administrative bodies, the National Labor Relations Board is not empowered to adjudicate constitutional claims. *Oestereich* v. *Selec-*

tive Service Bd., 393 U.S. 233, (1968), (Harlan J. concurring in result).

By reason of their broader and more varied jurisdiction, federal district courts are better equipped than administrative or regulatory agencies to vindicate constitutional rights. *Securities & Exch. Comm.* v. *Wall Street Transcript Corp.*, 294 F. Supp. 298, 307 reversed on other grounds. 422 F.2d 1371 (2nd Cir. 1970), Cert. denied 398 U.S. 958 (1970).

As the Ninth Circuit has noted in *Seay* v. *McConnell Douglas Corp.*, 427 F.2d 996 (9th Cir., 1970):

> "The policy behind the pre-emption doctrine is not served by deferring to the Board where a constitutional question is validily presented. The Board's special expertise in labor controversies does not extend to the interpretation of the Constitution. That field has traditionally been reserved to the courts." 427 F.2d at 1002-1003.

Whenever and wherever the state intrudes into the affairs of the church, judicial relief must be immediately available or the principles imbodied within the Religious Clauses of the First Amendment become meaningless.

To insist that Petitioner plead its case before an agency which is powerless to decide the constitutional issued raised herein would be to impose an onerous and needless burden upon the Dioceses. This futile exercise would serve the interests of no one and would merely impede ultimate judicial relief.

CONCLUSION

The Petition for a Writ of Certiorari sought in this case should be granted.

Respectfully submitted,

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Respondents.

OPPOSITION TO THE MOTION OF GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

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One of Respondents.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 76-1219

ANDREW G. GRUTKA, as Bishop of the Catholic Diocese of Gary, Indiana,

Petitioner,

vs.

ALEX V. BARBOUR, Regional Director of the Thirteenth Region, National Labor Relations Board,

and

LAY TEACHERS FEDERATION OF THE GARY DIOCESE, LOCAL 3493,

Respondents.

OPPOSITION TO THE MOTION OF GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The Lay Teachers Federation of the Gary Diocese, Local 3493, respectfully files this opposition to the motion of the General

Conference of Seventh-Day Adventists (hereinafter referred to as "Applicant") for leave to file brief as Amicus Curiae. The Applicant correctly stated that the undersigned refused to consent to the filing of a Brief by Applicant as Amicus Curiae and said refusal was for the following reasons.

The Union has proposed the following as the issue presented in this matter:

> Whether a United States District Court has jurisdiction to enjoin proceedings by the National Labor Relations Board with respect to private schools operated by a religious entity. (Un. Brief p. 2)

The National Labor Relations Board has posed the question as follows:

> Whether a District Court may enjoin National Labor Relations Board representation and unfair labor practice proceedings, where the procedures established by the National Relations Labor Act provide an adequate method for review of petitioner's contentions and have not been exhausted. (NLRB Brief p. 2)

As the foregoing issues show, the question here is not whether the National Labor Relations Act may be applied to Church operated schools as asserted by the Applicant. The very narrow question presented here is only whether the Federal District

Court had jurisdiction to enjoin proceedings before the National Labor Relations Board. The question raised by Applicant, which is not present here, that is whether the National Labor Relations Act may be applied to Church operated schools has been and is now pending judicial review in appropriate U.S. Courts of Appeals in the manner provided by the National Labor Relations Act (Un. Brief n.9, p. 16). Therefore, the Applicant has misconceived the real question pending in this matter, and no bases exists for intervention by Applicant.

Further, this matter has been thoroughly briefed by the three parties involved and there is no showing that the Petitioner's presentation fails to fully and adequately present the position which would be advanced by the Applicant. For the foregoing reasons the Union respectfully requests that the motion of the Applicant for leave to file reply brief as Amicus Curiae be denied.

Respectfully submitted,

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